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Counsel for Highland Capital Management, L.P.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	_____
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,	§	
	§	
Defendant.	§	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

COMPLAINT FOR (I) BREACH OF CONTRACT AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant, Highland Capital Management Fund Advisors, L.P. ("HCMFA" or "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against HCMFA as a result of HCMFA's defaults under two promissory notes executed by HCMFA in favor of the Debtor in the aggregate original principal amount of $7,400,000 and payable upon the Debtor's demand. Despite due demand, HCMFA has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. Through this Complaint, the Debtor seeks (a) damages from HCMFA in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the Notes), and (b) turnover by HCMFA to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, HCMFA is a limited partnership with offices located in Dallas, Texas and is organized under the laws of the state of Delaware.

CASE BACKGROUND

9. On October 16, 2019, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"), Case No. 19-12239 (CSS) (the "Highland Bankruptcy Case").

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].[2]

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The HCMFA Notes

13. HCMFA is the maker under a series of promissory notes in favor of the Debtor.

14. Specifically, on May 2, 2019, HCMFA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of $2,400,000 ("HCMFA's First Note"). A true and correct copy of HCMFA's First Note is attached hereto as **Exhibit 1**.

15. On May 3, 2019, HCMFA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of $5,000,000 ("HCMFA's Second Note," and together with HCMFA's First Note, the "Notes"). A true and correct copy of HCMFA's Second Note is attached hereto as **Exhibit 2**.

16. Section 2 of each Note provides: "**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee."

17. Section 4 of each Note provides:

> **Acceleration Upon Default**. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

[2] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

18. Section 6 of each Note provides:

> **Attorneys' Fees**. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. HCMFA's Default under Each Note

19. By letter dated December 3, 2020, the Debtor made demand on HCMFA for payment under the Notes by December 11, 2020 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 3**. The Demand Letter provided:

> By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of $7,687,653.07, which represents all accrued interest and principal through and including December 11, 2020.
>
> **Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.**

Demand Letter (emphasis in the original).

20. Despite the Debtor's demand, HCMFA did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020 or at any time thereafter.

21. As of December 11, 2020, there was an outstanding principal amount of $2,457,517.15 on HCMFA's First Note and accrued but unpaid interest in the amount of $35,884.46, resulting in a total outstanding amount as of that date of $2,493,401.61.

22. As of December 11, 2020, there was an outstanding principal balance of $5,119,827.40 on HCMFA's Second Note and accrued but unpaid interest in the amount of $74,424.05, resulting in a total outstanding amount as of that date of $5,194,251.45.

23. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Notes was $7,687,653.07

24. Pursuant to Section 4 of each Note, each Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

26. Each Note is a binding and enforceable contract.

27. HCMFA breached each Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

28. Pursuant to each Note, the Debtor is entitled to damages from HCMFA in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCMFA's breach of its obligations under each of the Notes.

29. As a direct and proximate cause of HCMFA's breach of each Note, the Debtor has suffered damages in the total amount of at least $7,687,653.07 as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

31. HCMFA owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs

and reasonable attorneys' fees and expenses) for HCMFA's breach of its obligations under each of the Notes.

32. Each Note is property of the Debtor's estate, and the amounts due under each Note are matured and payable upon demand.

33. HCMFA has not paid the amounts due under each Note to the Debtor.

34. The Debtor has made demand for the turnover of the amounts due under each Note.

35. As of the date of filing of this Complaint, HCMFA has not turned over to the Debtor all or any of the amounts due under each of the Notes.

36. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

WHEREFORE, the Debtor prays for judgment as follows:

(i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by HCMFA to the Debtor of an amount equal to (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses); and

(iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

$2,400,000.00 May 2, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, LP. ("***Maker***") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP ("***Payee***"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION FOUR HUNDRED THOUSAND and 00/100 Dollars ($2,400,000.00), together with interest, on the terms set forth below (the "***Note***"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term "***applicable federal rate***" (2.39%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:

FRANK WATERHOUSE

EXHIBIT 2

PROMISSORY NOTE

$5,000,000.00 May 3, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, LP. ("***Maker***") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP ("***Payee***"), in legal and lawful tender of the United States of America, the principal sum of FIVE MILLION and 00/100 Dollars ($5,000,000.00), together with interest, on the terms set forth below (the "***Note***"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term "***applicable federal rate***" (2.39%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:

FRANK WATERHOUSE

EXHIBIT 3

December 3, 2020

Highland Capital Management Fund Advisors, LP
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: Frank Waterhouse, CFO

Re: Demand on Promissory Notes:

Dear Mr. Waterhouse,

Highland Capital Management Fund Advisors, LP ("Maker") entered into the following promissory notes (collectively, the "Notes"), among others,[1] in favor of Highland Capital Management, L.P. ("Payee"):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
5/2/2019	$2,400,000	$2,457,517.15	$35,884.46	$2,493,401.61
5/3/2019	$5,000,000	$5,119,827.40	$74,424.05	$5,194,251.45
TOTALS	**$7,400,000**	**$7,577,344.55**	**$110,308.52**	**$7,687,653.07**

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of $7,687,653.07, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee's wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are

[1] Maker is also obligated to pay amounts due under promissory notes issued in favor of Payee prior to April 15, 2019. Pursuant to that certain *Acknowledgment from HCMLP*, dated as of April 15, 2019, Payee agreed not to demand payment on such amounts until May 31, 2021. Payee reserves all rights with respect to such amounts.

expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

Appendix A

ABA #:	322070381
Bank Name:	East West Bank
Account Name:	Highland Capital Management, LP
Account #:	5500014686

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
Highland Capital Management, L.P.	Highland Capital Management Fund Advisors, L.P.
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward LLP 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100	**ATTORNEYS** (If Known) Munsch Hardt Kopf & Harr, P.C. 500 N. Akard Street, Suite 3800 Dallas, Texas 75201 Tel.: (214) 855-7500
PARTY (Check One Box Only) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Count 1: Breach of contract; Count 2: Turnover pursuant to 11 U.S.C. 542

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
- [2] 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- [1] 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $7,687,653.07 plus interest, fees, and expenses

Other Relief Sought

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.	BANKRUPTCY CASE NO. 19-34054-sgj11	
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE January 22, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

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Counsel for Highland Capital Management Fund Advisors, L.P.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § §	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. Defendant.	§ § § § § § § § § § §	Adv. No. 21-03004

DEFENDANT'S ORIGINAL ANSWER

COMES NOW Highland Capital Management Fund Advisors, L.P. (the "Defendant"), the defendant in the above-styled and numbered adversary proceeding (the "Adversary Proceeding") filed by Highland Capital Management, L.P. (the "Plaintiff"), and files this its *Defendant's Original Answer* (the "Answer"), responding to the *Complaint for (I) Breach of Contract and (II)*

Turnover of Property of the Debtor's Estate (the "Complaint"). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMFA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant admits ¶ 14 of the Complaint.

15. The Defendant admits ¶ 15 of the Complaint.

16. The Defendant denies ¶ 16 of the Complaint. The document speaks for itself and the quote set forth in ¶ 16 is not verbatim.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. HCMFA's Default under Each Note

19. The Defendant admits that Exhibit 3 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 19 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 19 of the Complaint is denied.

20. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 20 of the Complaint.

21. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 21 of the Complaint and therefore denies the same.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 22 of the Complaint and therefore denies the same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 23 of the Complaint and therefore denies the same.

24. The Defendant denies ¶ 24 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. Paragraph 25 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

26. Paragraph 26 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 26 of the Complaint and therefore denies the same.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 27 of the Complaint and therefore denies the same.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient

to form a belief about the truth of the allegations in ¶ 28 of the Complaint and therefore denies the same.

29. The Defendant denies ¶ 29 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. Paragraph 30 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

31. Paragraph 31 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 31 of the Complaint and therefore denies the same.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 32 of the Complaint and therefore denies the same.

33. The Defendant denies ¶ 33 of the Complaint.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter. To the extent ¶ 34 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 34 of the Complaint and therefore denies the same.

35. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient

to form a belief about the truth of the allegations in ¶ 36 of the Complaint and therefore denies the same.

37. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

JURY DEMAND

38. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

39. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 1st day of March, 2021, a true and correct copy of this document was electronically served by the Court's ECF system on parties entitled to notice thereof, including counsel for the Plaintiff.

/s/ Davor Rukavina
Davor Rukavina, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Tuesday, May 25, 2021 1:30 p.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	**Adversary Proceeding 21-3003-sgj** JAMES DONDERO'S MOTION TO STAY PENDING THE MOTION TO WITHDRAW THE REFERENCE OF PLAINTIFF'S COMPLAINT [22] STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE [21]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	**Adversary Proceeding 21-3004-sgj** STATUS CONFERENCE RE: MOTION TO WITHDRAW THE REFERENCE
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. NEXPOINT ADVISORS, L.P., Defendant.	**Adversary Proceeding 21-3005-sgj** STATUS CONFERENCE RE: MOTION TO WITHDRAW THE REFERENCE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - MAY 25, 2021 - 1:33 P.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good afternoon. Please be seated. All right. We have settings in some Highland adversary proceedings. These are motions to withdraw the reference in three different adversary proceedings. So I will start with Highland versus Dondero, Adversary 21-3003. Who do we have appearing for Movant, Mr. Dondero?

MS. DEITSCH-PEREZ: Deborah Deitsch-Perez. Good morning. Or afternoon, Your Honor.

THE COURT: Good afternoon. All right. For the Debtor, who do we have appearing?

MR. POMERANTZ: Good morning, Your Honor. Good afternoon, Your Honor. Jeff Pomerantz and Greg Demo; Pachulski Stang Ziehl & Jones. Also on the line is John Morris. Greg Demo will be handling the argument today.

THE COURT: All right. Thank you. I'll go ahead and get appearances in the other two adversaries. The next one is Highland versus Highland Capital Management Fund Advisers, L.P., Adversary 21-3004. Who do we have appearing for the Movant on this one?

MR. RUKAVINA: Your Honor, good afternoon. Davor Rukavina for the Movant and Defendant.

THE COURT: All right. Thank you. So, same team appearing for the Debtor on this one, I presume?

MR. DEMO: Yes, Your Honor.

MR. POMERANTZ: Yes, Your Honor. I forgot to mention Jim Seery, the Debtor's CEO and a member of the Independent Board, is also present today as well.

THE COURT: All right. Thank you. And last but not least, we have the adversary Highland Capital versus NexPoint Advisors, L.P., Adversary 21-3005. Who do we have appearing for the Movant, NexPoint?

MR. RUKAVINA: Davor Rukavina again, Your Honor. Good afternoon.

THE COURT: Okay. Good afternoon. And then we have the same team, I presume, for the Debtor for this one as well, Mr. Pomerantz, correct?

MR. POMERANTZ: That is correct, Your Honor.

THE COURT: All right. So, let's be sure the record is crystal clear here. These are status conferences with regard to the three motions to withdraw the reference. As we all know, under Local Bankruptcy Rule 5011, the Bankruptcy Court is required to hold a status conference, hear the parties' arguments, and then make a report and recommendation to the District Court to actually rule on the motions to withdraw the reference.

We do have a motion for stay pending a decision on the

motion to withdraw the reference by Mr. Dondero, so the Bankruptcy Court actually decides that motion.

All right. So, as far as sequence on these, I don't know if you all have talked and reached any agreements. It occurred to me there were two different reasonable ways to do this. We could have, for all three of the adversaries, each of the Movants make their arguments -- in other words, Ms. Deitsch-Perez and then Mr. Rukavina -- and then have the Debtor collectively respond, and then rebuttal at the end, or we could take this where we do Dondero first, argument, you know.

MR. RUKAVINA: Your Honor, Ms. Deitsch-Perez and I had conferred and we had suggested that I begin, since I have a couple arguments that are duplicative of hers, and then I can finish my point, and then I know that her adversary has other issues, and she can follow up with what I have said on those other issues, if that's agreeable to the Court.

THE COURT: Okay. So, joint Movant presentation on all three of these, but you go first and then Ms. Perez, and then Mr. Demo would collectively respond to all three arguments, and then back to you all for rebuttal? Any disagreement with that from the Debtor side? Do you want to argue for anything different?

MR. DEMO: No, Your Honor. That's fine with the Debtor.

THE COURT: Okay. Makes sense to me. All right. Well, with that, Mr. Rukavina, you may proceed.

MR. RUKAVINA: Thank you, Your Honor. And I will be discrete and I will be brief, because I think that the issues are discrete and brief and not evidentiary. And I think we'll talk about evidence and documents some time later. We can talk about that when the Debtor's turn comes.

To me, there's very few facts that are relevant, and those facts appear on the face of the record, nor are they disputed.

My two clients have disallowed proofs of claim. So they did file proofs of claim. Those claims were disallowed by final order months ago. So my clients are not prepetition creditors of the Debtor. Nor under any theory would these two adversary proceedings involve anything having to do with my clients' former claims.

I say that, of course, because we know *Stern v. Marshall* and we know that whether there's a counterclaim or a claim, it changes the jurisdictional analysis. Here, the Advisors have no claims.

These two adversaries are very, very simple. The Debtor has sued my clients on prepetition promissory notes. So the Court's decision or report and recommendation today comes down to, I think, three very targeted issues: Is a suit on a promissory note, the prepetition promissory note, a core claim? One. Two, do my clients have jury rights? And then,

three, what about the Debtor's 542 action?

So, my two adversary proceedings are virtually identical. The Debtor sues my clients for a breach of contract in not paying these promissory notes, and the Debtor seeks a 542(b) turnover.

In its responsive briefing, the Debtor has not contested that the cause of action itself, the breach of contract, is non-core, nor has the Debtor contested that I have jury rights.

The Debtor's sole real argument, other than a bunch of mud being thrown on the wall which I think has no relevance at all today, not to the Court's jurisdiction, the Debtor's sole real argument is that the 542(b) claim, which clearly is a core claim, that the fact that they have sued for that claim somehow now makes this whole adversary proceeding a core claim, one in which I take it that jury rights aren't even involved. So we'll talk about that a little bit. But those are the three issues that I think that the Court needs to focus on for the HCMFA and the NexPoint adversaries.

Obviously, a breach of contract claim, a suit on a promissory note, that exists outside of bankruptcy. That is not a right or a cause of action created by a bankruptcy. Clearly, that's a non-core matter. That's the same as *Marathon v. Northern Pipeline*, where it was a suit on a prepetition contract. And we have given Your Honor plenty of

case law, and I don't think it can really be disputed that, all other things being equal, the Debtor's lawsuit for breach of contract on a prepetition contract is a non-core claim. That means that the reference -- whether the reference should be withdrawn or not is an issue of permissive reference withdrawal, because even though it's non-core, of course, the Court can make a report and recommendation and there's a trial de novo before the District Court. But we begin with that it's a non-core claim.

We add to this mix the *Stern v. Marshall*, which couldn't be clearer in that, when all that a debtor is doing is trying to augment its estate by prepetition causes of action, the Court doesn't have constitutionally core jurisdiction.

So, now we look at the jury right. There's no question that there's a Seventh Amendment jury right when you're being sued for breach of contract. That's as *Bankruptcy 101*, as *Common Law 101*, as it gets. And my clients are being sued for breach of contract. We have asserted our jury right. Again, because the prepetition proofs of claims have been adjudicated and are in no way, shape, or form linked with these two promissory notes, it's impossible to argue that we have somehow waived our jury rights. And the Debtor has not made that argument, to its credit.

So, because the Fifth Circuit holds that when it comes to jury rights reference withdrawal is mandatory, we believe that

the Court must withdraw or that the District Court must withdraw their reference of these two adversary proceedings, the only question then being at what point in time should the District Court do that. And we can talk a little bit about that.

If Your Honor needs to understand the basis of my clients' prepetition proofs of claim, I can certainly go through those in detail. Suffice it to say that those claims led with -- have to do with overpayments and not getting benefits of the bargain for the transiti... I'm sorry, for the prepetition shared services agreements. So even if there was some relation between the disallowed claims and the Debtor's claims in that situation, there is no core nucleus of operative facts. Again, these are standalone promissory notes that have nothing to do in the world with those disallowed claims under the shared services agreements, nor have we asserted any affirmative defense or setoff based on those disallowed claims. So, again, all you're dealing with are prepetition promissory note claims against someone who is not a prepetition creditor of this estate.

Now we go to the 542(b) issue.

THE COURT: Can I --

MR. RUKAVINA: Your Honor, we believe --

THE COURT: Can I interrupt with a question? And this wasn't really argued in any of the pleadings, and yet

it's sticking in my brain as an issue, maybe. This is a NexPoint issue only. Okay? The NexPoint note, unlike the other notes in these three adversaries, is not a demand note. It, as you know, had the annual payments, and the whole complaint of the Debtor is centered around NexPoint missed its December 31, 2020 payment. That was a default. The Debtor was entitled to accelerate and declare the whole amount due. So here's where I'm going. In this adversary, the NexPoint adversary, there's an affirmative defense argued by NexPoint that basically: Debtor, you made us default because you, under the shared services agreement, were doing accounting work for us, and I'm paraphrasing, but that's the argument, that you were negligent in performing your duties under the shared services agreement and made us default.

So here's my question. As I understand it, NexPoint has an administrative expense that it has asserted in this case that we've kicked the can down the road and I can't remember now when we're going to have the trial on that. My question is, even though NexPoint's proofs of claim have now been disallowed, what if your defense in this case is inextricably intertwined with your administrative expense claim? I mean, (a) is that the case, and (b) does that all of a sudden convert the breach of contract to a core matter?

MR. RUKAVINA: Your Honor, I think those are insightful questions, but I think that it's an easier answer,

because they are not inter -- I have a hard time pronouncing that.

THE COURT: Me, too.

MR. RUKAVINA: They're not intertwined.

THE COURT: Uh-huh.

MR. RUKAVINA: They're not inseparable. The base of the administrative claim is that we were billed by the Debtor postpetition for services that the Debtor didn't provide, so we were paying for Debtor employees who weren't there. In other words, we overpaid. The Debtor overbilled us to the tune, between both Advisors, to the tune of $14 million for employees that the Debtor had long terminated ago and wasn't providing.

The basis, therefore, of the postpetition overpayment has nothing to do in the world with the Debtor's own negligence --

THE COURT: Okay.

MR. RUKAVINA: -- in how it provided services to us regarding this promissory note.

THE COURT: Okay.

MR. RUKAVINA: We have chosen, and I -- we have chosen, and I think it's right, it's our right, we have chosen to assert the Debtor's -- obviously, it's alleged at this time -- we have chosen to assert the Debtor's failure to us as an affirmative defense to this promissory note. We have not chosen to assert that as an affirmative cause of action

seeking money damages for negligence or something like that. And we have done that intentionally, to be quite blunt, so as to keep it apart from the admin claim. Because the admin claim clearly is a core matter. We're not arguing that the reference should be withdrawn. That's set for trial in late September. And that body of discovery, really, will be completely separate from this. We have intentionally kept them separate, and perhaps the Debtor has as well, so as to not cloud the issues.

This is a clean promissory note, and do we have an affirmative defense under Texas law because basically the Debtor made us do it?

So that's my answer to the Court. Now, if the Court takes it to the next level and says, well, what you're really saying, Mr. Rukavina, here is that you have an affirmative postpetition cause of action against the Debtor, you're just sprucing it up as an affirmative defense instead of an affirmative cause of action, I would suggest to you that now we're getting too much and too far into the whole *Stern v. Marshall* issues. What we have been sued on is a prepetition promissory note. That's it. And we have no prepetition claim. And I don't think we should be crossing a potential prepetition cause of action against us against a postpetition right that we have against the Debtor.

THE COURT: Okay.

MR. RUKAVINA: Finally, Your Honor, just briefly on the 542(b) issue, it really is purely an issue of law. We have cited to you three opinions from this district -- pardon me -- that go back to Judge Abramson. There's the *Satelco* case, which I think is a very well-known case. It's been cited to many, many times. There's also Judge Lynn's opinion in *Mirant*. And those opinions just basically say, okay, debtor, if you're suing on a prepetition receivable, a prepetition promissory note, you can't use 542(b) to put the cart before the horse. You've got to prove that your counterparty is liable to you, and then, then, 542(b) is really a remedy, it's a collection remedy, the same as any post-judgment remedy.

The Debtor doesn't like these old opinions. It calls them old; I call them *stare decisis*. And the Debtor argues, well, you should do what these other bankruptcy courts from across the country have done and you should basically just use 542(b) to try the prepetition receivable. So, forget about jury rights, forget about core. 542(b), according to the Debtor, is the congressionally-mandated new cause of action that lets the Court actually liquidate a claim even before it collects on that claim.

I have pointed out the absurdity with this argument. The argument is the same as saying, well, Judge, why don't you give me -- you can give me a turnover order, you can give me a

receiver, so because you can do that, let's now just liquidate an actual cause of action in the context of a turnover. That's not how it works. You get your judgment, you get your right to a payment, and then you get your remedies.

It's not just me saying that, Your Honor. I have cited the D.C. Circuit, the Eleventh Circuit, the Eighth Circuit, and a host of lower district court opinions from across the country that confirm that, that 542(b) cannot be used to liquidate a disputed claim.

I submit, respectfully, that if the Court decides to rewrite *Satelco*, if the Court believes that 542(b) can be used as an actual cause of action, one, I would remind the Court that in a case a few years ago against Michael Craig Kelly, where we had a reference withdrawal, Diane Reed, the Trustee, was also trying to use 542(b). The Court, in its report and recommendation to the District Court, basically said that no, as I have pointed out, you can't do that. And I can certainly share with Your Honor that report and recommendation. I just remembered it this morning, so I did not include it in my briefing.

But if the Court decides to revisit the issue, then I would respectfully submit that what we're creating here is exactly a *Northern Pipeline* and a *Stern v. Marshall* issue. As *Northern Pipeline* made it clear, Congress cannot take a common law cause of action, a cause of action between private

litigants, such as a breach of contract, such as a promissory note, which is the most archetypical breach of contract claim that there is, Congress can't take that, slap a different name on it like turnover, and somehow undo the Constitution. You can't strip me of my jury rights on that, you can't strip me of my right to an Article III judge, just because you label this a 542(b) turnover.

And I respectfully submit, Your Honor, that if that is what this Court recommends, and if that is what the District Court does, then what we are really creating here is another *Stern v. Marshall*. And as I've been telling everyone that I've known for the last 10 years, that's the last thing that our practice needs.

So, Your Honor should recommend the withdrawal of the reference for my clients because I believe that it's clear we have a jury right. I believe that the reference should be withdrawn immediately. This Court has more than enough going on in this case. There is no crossover discovery here. And if we're going to go to a jury, then it really ought to be the District Court, that's the expert on jury trials, or its magistrate judge, that's the expert on jury trials, deciding pretrial and prejudgment matters, most of which will have to do probably with what the quality of evidence and what evidence there will be that can be even presented to the jury.

Your Honor, that's my argumentation, in a nutshell. I

really don't have anything to add. But I'm here to answer any questions, and I will at the appropriate time talk about the Debtor's purported evidence for today. Thank you.

THE COURT: All right. Thank you. No further questions at this time.

Ms. Perez?

MS. DEITSCH-PEREZ: Yes. And could I share my screen?

THE COURT: You may.

MS. DEITSCH-PEREZ: Okay. Are you able to see the screen?

THE COURT: Yes.

MS. DEITSCH-PEREZ: Okay. And is the -- the full screen is up there so you can see it?

THE COURT: I can see it. Uh-huh.

MS. DEITSCH-PEREZ: Thank you. Okay. All right. Because I start -- we -- Mr. Rukavina and I started at the same time, there's a little overlap, but where we overlap I will go quickly.

THE COURT: Okay.

MS. DEITSCH-PEREZ: Okay. So a quick summary. We have a mandatory withdrawal of the reference argument because of the involvement of federal nonbankruptcy law, and I'll go into more detail on that in a moment.

Like Mr. Rukavina's clients, we have a required withdrawal

because of Mr. Dondero's jury right, which has not been waived. And I'll address the Debtor's two waiver arguments.

And there is permissive withdrawal because the claim is non-core, it is a prepetition state law breach of contract claim, and this Court could only report and recommend, and so the efficiencies favor immediate withdrawal to the District Court.

All right. The Debtor cites a good number of cases, but there is a Northern District of Texas case that looks at when this Court should recommend immediate withdrawal of the reference, and this is it. And the Debtor says quite a lot about the expertise that this Court has with the matter generally and with Mr. Dondero generally and repeats Mr. Dondero's name, I don't know, a couple dozen times, but that's irrelevant. Because once it's been determined that the action involves non-Title 11 laws that affect interstate commerce, the withdrawal of the reference is mandatory, regardless of the expertise of either court.

And that's why, in *Great Western*, and I think it was Judge Barefoot Sanders, said, if it's not a core proceeding -- and this is not, for all the reasons that Mr. Rukavina noted -- the bankruptcy judge's finding would have to be reviewed de novo, and that would result in duplication of effort and a waste of resources, and that's why the most efficient proceeding would be to go directly to the District Court.

And so the question the Debtor raises, well, there's not -- they make light of the tax law that's involved. So the question is, well, how much nonbankruptcy law does there have to be to implicate mandatory withdrawal of the reference? Well, again, *Great Western* provides the answer. It has to materially affect the disposition of the case -- doesn't have to be dispositive of the case -- and it has to involve substantial consideration of IRS Code provisions. What I took out there was ERISA, not because it was something bad for us but because ERISA isn't implicated here.

And the Debtor's cases don't really dispute that. What they all say -- and if you look at them, and we've pointed that out in our reply brief -- the Debtor points to cases where what the court says is this involves a routine tax matter or something that is typically heard by bankruptcy judges. They make no argument that the issue here, which is what are the tax implications of having a forgivable loan and why does the law on how you create deferred compensation with a loan, how does that relate, that's not something that frequently comes up in a bankruptcy court. In fact, we were unable to find a single case where a bankruptcy judge dealt with that issue.

So the only Northern District case that the Debtor raises is one that's not remotely similar. It's *Ondova*, where the parties sought to withdraw the reference to an entire

bankruptcy case. By contrast is *Great Western*, which says the withdrawal of the reference is mandatory when you have this kind of unusual or atypical tax matter.

So, what is the tax issue? In Mr. Dondero's amended answer and in his discovery responses, he contends that the three notes are subject to a condition subsequent under which they could be forgiven. This is a form of deferred executive compensation that's governed by rules set out in the federal tax law. If you do it wrong, it's deemed compensation immediately and you owe taxes right away. If you do it correctly and the determination of the circumstances under which the loan can be forgiven are not wholly in the debtor -- here, I mean debtor as in obligor's control -- then they can be deferred compensation and then taxes are due at the point at which the loan is forgiven, and then there is forgiveness of debt income.

So, understanding these rules will inform the fact-finder about the strength and the credibility of Mr. Dondero's defense when he says, this is why I did this, this is what I expected, this is how I anticipated the loans could become my compensation and why. So these tax considerations are pivotal to the potential deferred compensation being structured in the way that it was.

And this information was provided to the Debtor. Interrogatory #1 asked Mr. Dondero to identify the condition

subsequent referred to in Paragraph 40 of the amended answer. There were not many questions. This is pretty much it on what the Debtor asked about the defense. They could have asked more. They didn't. I presume they will ask when they depose Mr. Dondero, but they did not yet. So the absence of a fuller record of what consti... of how the tax law works and why it's important, that's because the Debtor simply didn't ask, because they were content to instead make fun of the defense, which is what they did in their papers.

And so the answer in the interrogatories is that the condition subsequent referred to refers to the disposition of the portfolio company interests that were managed or owned, directly or indirectly, by Highland and its affiliates, or managed, the disposition of those on a favorable basis or on a basis wholly outside Dondero's control. So when those things happened and created a liquidity event, then those loans would be forgiven and at that point Mr. Dondero would have income. But those will all be explored further in discovery and in expert testimony, both -- we anticipate a tax expert and a executive compensation expert.

THE COURT: Question for you. Is this going to be an issue that applies to all three loans? Because one --

MS. DEITSCH-PEREZ: Yes, it is.

THE COURT: One of the promissory notes says, this is a tax loan, and the other two do not say that.

MS. DEITSCH-PEREZ: But the records of the company -- and this was something that was submitted by the Debtor -- show that all three loans were recorded on the books as tax loans.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And so it simply -- and then, in addition to that, all three loans, in -- I think it's either Paragraph 8 or 9 of the note -- refer to other agreements, and that would be somewhat baffling but for the fact that there is in fact an other agreement here that presumably the Debtor will explore when it deposes Mr. Dondero.

THE COURT: Okay.

MS. DEITSCH-PEREZ: So, going on to the turnover claim, and I'm not going to beat what Mr. Rukavina said to death because he said it quite well, but I'm just -- rather than add some cases, I'm going to add *Collier's* to the mix, which is certainly the premier authority. And Debtor's logical flaw is so well known that it has its own section in *Collier's*, where it berates and bemoans the practice of some district courts to use orders to turn over property of the estate as an end run around *Marathon*. And it says, in the strongest possible terms -- and there's more cited in our brief -- that an action on a promissory note is not a turnover claim. That's a breach of contract claim, if it's disputed. And simply name-calling, as the Debtor does -- it says

Dondero's claim is spurious and invalid; I think it also says it's a red herring -- the right to a jury trial is not lost because of the strength of the Debtor's disparaging remarks. Instead, the Court should look at *Satelco* because it makes clear that an action to recover a contested debt is not properly the subject of a turnover action. And in a way, the Debtor tacitly acknowledged that, because it didn't just bring a turnover claim, it brought a breach of contract claim, and that's its principal claim, and that's the correct claim here, and that's one on which Mr. Dondero has a right to a jury trial.

So the Debtor then says ah-ha, you filed a proof of claim with respect to the notes, and made a very big deal about it in its response to the motion to withdraw the reference. It then had to sheepishly withdraw that in a supplement because it recalled that the proof of claim regarding the notes was withdrawn, and we've cited for the Court law that says, once it's withdrawn, it's as if -- it's as if it never existed, especially when, as here, it was withdrawn before the adversary proceeding was filed. So it preserved an absolute right to a jury trial.

And there you can look at the *In re Manchester* case that Judge Houser decided. And there, even when a proof of claim was withdrawn after the adversary case was filed, Judge Houser determined that there was a genuine desire for a jury trial.

It wasn't fictional. It wasn't vexatious or designed to harass the debtor.

There's no question here that Mr. Dondero does want and would for obvious reasons want a jury trial. And so certainly the withdrawn proof of claim should not be a barrier.

And then unrelated proofs of claim are also not a waiver of the right to a jury trial. It's only when the adversary and the existing proof of claim are inextricably intertwined -- I got the inextricably in -- that resolution of the -- if resolution of a proof of claim would also resolve the adversary, then there would be a waiver. But we don't have that here because the remaining proofs of claim are all in the nature of contingent contribution or indemnity claims with respect to things that haven't even happened yet. And so they in no way relate to this adversary. They have to do with the 2008 taxes and other potential possible future events where something might cause liability for Mr. Dondero as an officer or director, and those have not arisen.

Okay. In addition, the Debtor says that the setoff affirmative defense causes a waiver. And they only cite cases from outside the jurisdiction. The only case we found on the issue in this jurisdiction is to the contrary. That's *In re Base Holdings*. That's this Court's case. So even a counterclaim, much less a setoff, if it would not be resolved by the adjudication of a party's proof of claim, the

Bankruptcy Court cannot constitutionally finally resolve the setoff or counterclaim if it is in fact a non-core claim, as here.

Here, the issue is even simpler because Mr. Dondero dropped the setoff affirmative defense, as set forth in the Debtor's -- the response to Debtor Interrogatory 3, and that is annexed as Exhibit 4 in Mr. Dondero's appendix to the motion.

So if you look at all of the factors -- and the 2020 *Curtis* case in the Southern District of Texas has a good summary, and we cite that and you can find that in our pleadings -- you look at whether it's core or non-core matters predominate. Here, the determination rests on the breach of contract case. The turnover claim is the remedy. It's the tail of the dog, not the dog. You want to have efficiencies? Well, here, because the Bankruptcy Court can only report and recommend, it's more efficient for the District Court to have the proceeding. There is so much going on in this bankruptcy proceeding that does not have to do with these notes that it would expedite the bankruptcy to take this out.

On the issue of forum-shopping, the question is, who's forum-shopping here? Mr. Dondero has a right to a jury trial, so it is only natural that he would want to be in the District Court because that is the only place he can have a jury trial. It's the Debtor that's forum-shopping because it has expressed

concern about the possibly more favorable District Court. So that's where the forum-shopping is, and so that consideration weighs in favor of withdrawal.

Obviously, a jury demand has been made, so that is another reason why there should be withdrawal of the reference.

So let's look at these factors. The Debtor says this is a simple note case. So if in fact it's a simple note case, which is a state court cause of action, there's no particular bankruptcy court expertise needed. And as we saw, there is some federal law expertise needed on the tax issues.

Also, this issue is not intertwined with other matters in the bankruptcy. It's a core matter. This Court can only report and recommend. The District Court has to conduct the jury trial, so it would be most efficient for it to gain familiarity. As I said, it's the Debtor that's forum-shopping. If in fact, as the Debtor says, this case is so clear, why is the Debtor afraid that the District Court may be possibly more favorable?

And the most analogous case is the *In re Quality Lease* case we cite. There, the reference was withdrawn. It was withdrawn immediately. And the Court indicated it was particularly important for the reference to be withdrawn early because the case was going to be tried to a jury and that would mean there would be motions in limine. These would -- that it would be better for the district court to be familiar

with the case in order to decide evidentiary issues, expert issues, all of the things that are going to come up in this case.

Okay. And *Curtis*, which we cite in the brief, is particularly instructive, and it argues for immediate withdrawal of the reference when a jury trial is requested.

Okay. So I'm briefly going to cover the motion for a stay. This Court has very recently made clear its view on whether a stay should be granted pending the District Court deciding the motion to withdraw the reference. And that was last week, when I was unable to be here. But there, Mr. Phillips was arguing against a stay that was being sought by the Creditors' Committee, and this Court said very clearly it's a hundred percent of the time my practice, and I think the practice of other bankruptcy judges here, and it's out of deference to the District Court, if the District Court ends up withdrawing the reference, they may say I want to withdraw the whole darn thing, we don't want you even doing pretrial matters, we don't want to get ahead of them, and that's why the Court was arguing that Mr. Phillips shouldn't be arguing against the stay that was sought, because since they were seeking to withdraw the reference, nothing should be happening in the case until that was decided.

So there's no reason that Mr. Dondero should not be afforded the benefit of that practice that the Court so

strongly asserted last week. And it would also relive the pressure of the breakneck pace that the Debtor has demanded for this case, and it would allow for consistency between the treatment of the parties in this case and the treatment of the parties in the case involving the Creditors' Committee and the Debtor.

Okay. And just to sum up, we have the mandatory withdrawal issues related to the tax law. Mr. Dondero has not waived his right to a jury trial, and this Court obviously cannot constitutionally conduct a jury trial breach of contract non-core matter, so this Court couldn't even constitutionally make final findings. And the summary judgment motion that the Debtor has threatened, clearly, if the Debtor is going to make a summary judgment motion, it would be better for the District Court to have it. That would most certainly give the District Court the best heads up to be able to conduct the jury trial, because there are factual issues here. And so this combination of factors and the Debtor's not really even tacit admission -- it's pretty overt -- that it has an advantage in the Bankruptcy Court dictates that the reference should be withdrawn for all purposes immediately.

And I thank you, and I'm going to try and see if I could figure out how to turn off the sharing.

THE COURT: Got it.

MS. DEITSCH-PEREZ: Thank you.

THE COURT: All right. Thank you.

Mr. Demo, I'll hear from you next. And I counted four of my own cases that collectively Mr. Rukavina and Ms. Deitsch-Perez argued -- well, three published ones, *JRjr33*, *Ondova*, *Base Holdings*, and then Mr. Rukavina mentioned *Craig Kelly*. So, what are you going to argue? Are you going to tell me I was wrong in all of those cases, or --

MR. DEMO: I was --

THE COURT: I'm sorry, that's not a fair question, but it's -- it is what it is. What would you like to say, Mr. Demo?

MR. DEMO: Well, I think first I'd like to start by introducing some very limited exhibits, because -- and normally I wouldn't do this, because I do think that it's generally a legal matter, but Ms. Deitsch-Perez referenced the notes, referenced tax issues that supposedly were in the notes, referenced arguments that or defenses that Mr. Dondero raised in his answer. And quite honestly, none of that stuff is in those things. So I would like to put those into evidence so that this Court can review them and we can have them on the record.

And if that's all right with Your Honor, I can point you to our witness and exhibit list in this case and have those things admitted.

MR. RUKAVINA: Your Honor, does Mr. Demo propose to have those admitted for my two adversaries?

MR. DEMO: No. I think right now we would plan on doing just a limited admission of Mr. Dondero's notes, Mr. Dondero's first answer, and then his amended answer. And we are going to talk, you know, about a few other limited things, about how the notes are on the balance sheet. So I would like to also admit the Debtor's schedules, which were admitted in the motion to compel last Thursday, and then also to admit the MORs, which were also admitted last Thursday as well.

MR. RUKAVINA: Your Honor, I apologize. Again, are those being offered in my two adversaries or -- again, there's no --

MR. DEMO: I'm sorry, Mr. Rukavina. The answer is -- for the MORs and for the schedules, the answer is no.

MR. RUKAVINA: Okay. And, of course, there was some sound right when you gave me your answer. At least, I didn't hear your answer.

MR. DEMO: The MORs and the schedules, we would admit in your case as well.

MR. RUKAVINA: Your Honor, I have no problem with that.

THE COURT: All right. Well, before I see if Ms. Perez has an objection, let me be a little bit more clear. I am looking at the witness and exhibit list that you filed at

Docket Entry 46. Can you just go through that and tell me which ones you're offering?

MR. DEMO: Yes, Your Honor. So, we filed -- we filed an amended exhibit -- witness and exhibit list at Docket #48. We filed that yesterday. So that's what I'm looking at.

THE COURT: Okay. Let me pull that up. I have the notebook. So what is the docket again?

MR. DEMO: 48, Your Honor.

THE COURT: 48. In the Dondero adversary?

MR. DEMO: Yes, Your Honor. And we did also file witness and exhibit lists in the NexPoint and HCMFA adversary, but all the numbers are the same in those.

THE COURT: Okay. Bear with me. (Pause.) Okay. I have it pulled up now. So which ones are you seeking to offer?

MR. DEMO: 4, 5, and 6, which are the three Dondero notes.

THE COURT: 4, 5, and 6, the three Dondero notes?

MR. DEMO: We would also offer Mr. Dondero's responses to the interrogatories and requests for admission, which are 16 through 20.

THE COURT: Okay.

MR. DEMO: We would offer 28, 29, --

MS. DEITSCH-PEREZ: Wait, wait, could you stop a minute? There is -- which interrogatory answers? Because we

-- they're our Exhibit -- the interrogatory responses are Exhibit 4 in our appendix. Is this something different that you're offering?

MR. DEMO: I'm looking at my witness and exhibit list, Docket #48.

MS. DEITSCH-PEREZ: Uh-huh. And what are the --

MR. DEMO: And I'm looking at Entries 16, 17, 18, 19, and 20.

MS. DEITSCH-PEREZ: Yes, that's five things. What are the five things that you're seeking to admit?

MR. DEMO: Mr. Dondero's objections and responses to Highland's second request for production.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to the first request for admissions.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to second request for admissions.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to Highland's first set of interrogatories.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to Highland's second set of interrogatories.

MS. DEITSCH-PEREZ: Okay. Thank you.

MR. DEMO: You're welcome.

THE COURT: All right.

MR. DEMO: And then next --

THE COURT: Go ahead.

MR. DEMO: Sorry, Your Honor. Is Docket Entries 20 -- I mean, excuse me -- Exhibits 28, 29, and 30, which are the Debtor's schedules, amended schedules, and Statements of Financial Affairs.

MR. RUKAVINA: And those are the only ones for my case, right, Mr. Demo?

MR. DEMO: Through current, yes. We're going to have MORs which will be in your case as well.

MR. RUKAVINA: Okay.

MR. DEMO: But yes.

THE COURT: Okay. 28, 29, and 30.

MR. DEMO: And then --

THE COURT: Go on.

MR. DEMO: And then 44 through 64, which are the Debtor's MORs and then some limited backup, depending on the --

THE COURT: All right. So, any objection -- I think we've heard from Mr. Rukavina. He's fine with those limited items applicable to his adversaries. Ms. Deitsch-Perez, any objections?

MS. DEITSCH-PEREZ: No. I mean, I would note that

the notes are also annexed to the adversary complaint.

THE COURT: Okay.

MS. DEITSCH-PEREZ: So they're part of this record. So, no objection to those.

THE COURT: All right. So these will be admitted.

(Debtor's Exhibits 4 through 6, 16 through 20, 28 through 30, and 44 through 64 are received into evidence.)

MR. DEMO: Thank you, Your Honor. I'd like to start maybe a little bit out of order and start with the motion for a stay pending resolution of this matter. And I just want to point out, well, first, obviously, that the Debtor is not in favor of a motion for stay pending resolution of this matter, because we've actually done significant amounts of work. You know, we had Mr. Seery's deposition yesterday. Mr. Dondero's deposition is scheduled for Friday. Fact discovery ends on Friday. Discovery has been ongoing. We've produced numerous documents. We've made numerous requests. And Mr. Dondero has made multiple prior requests to schedule -- to extend this matter. And the hearings on this matter are set for the next 90 to 100 days.

There is no basis to stay there, and there is a harm to the estate in staying it, Your Honor. Specifically, these assets are material assets of the Debtor's estate. They were built into the plan projections. And the liquidation and collection on these assets will materially drive creditor

recoveries.

To the extent that there's a delay in that, and there already is a delay because of these matters, but to the extent that there's a further delay in that, there is a substantial harm to the Debtor's creditors by that delay.

THE COURT: Did you say discovery cuts off Friday, this Friday?

MR. DEMO: Yes, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And that is over our objection. We had sought a longer schedule, and the Debtor seems to be trying to do an end run around the withdrawal of the reference by pushing the case to conclusion before the District Court can decide.

MR. DEMO: I would object to that characterization, Your Honor. We're trying to get resolution and we're working quickly towards that, as is generally the matter in bankruptcy.

THE COURT: Okay. My only question is, is there a scheduling order in place right now and discovery cuts off this Friday under the governing scheduling order?

MS. DEITSCH-PEREZ: That is correct.

MR. DEMO: There is a scheduling order, yes.

THE COURT: Okay. Is there a motion to amend the scheduling order pending, by any chance?

MR. DEMO: No, there isn't, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: There was -- there was a motion filed, the Debtor opposed it, and the Court granted a much more limited extension than the -- than Mr. Dondero requested.

THE COURT: Okay.

MR. DEMO: Your Honor, I would just ask, you know, I'm arguing. Ms. Deitsch-Perez had her chance. So, to the extent that she has anything to add, I mean, I would --

THE COURT: All right. Well, I asked the question, and I'm fine with both of you weighing in with an answer.

All right. Continue.

MR. DEMO: Yeah. So, yes, so discovery ended Frida, there is damage to the creditors with a delay, and we would oppose the motion to stay.

And that's, you know, quite honestly, Your Honor, all we really have on the motion to stay, because I think it wraps up into the balance of the action, which is a core action which should remain here. It's a core action that doesn't have a jury right and it's a core action that Your Honor can enter a final order on.

And I meant to kind of go through that first, but I do feel like I need to start with the mandatory abstention. Because Ms. Deitsch-Perez has made a lot of references to the Tax Code and a lot of references to tax law and a lot of

references to what Your Honor will have to rule on. But quite honestly, Your Honor, none of that is in the record. Mr. Dondero filed his first answer. It didn't mention the Tax Code. The only affirmative defense was that the note had been forgiven already. Mr. Dondero filed his amended answer. It didn't mention the Tax Code. The only affirmative defense is that there was a condition subsequent that was tied to some sale of assets without any more. There is no reference to the Tax Code. There's no reference to specific code provisions throughout these documents. There's no reference to any code provision in the three notes.

Ms. Deitsch-Perez made reference to somehow incorporating other agreements into those notes. Those notes are each two pages. None of them have that language. They're all standalone.

The only reference in this case, Your Honor, to taxes is a reference in the first note, which is dated February 2, 2018, saying that the proceeds of the note are used to pay Mr. Dondero's tax liabilities. That's it. That is the only actual reference in this case to any type of tax.

The fact that Mr. Dondero used the proceeds of the loan to pay taxes really is irrelevant. I mean, you can use the proceeds of the loan to pay anything. It doesn't implicate the Tax Code.

What Your Honor is going to have to decide here is not tax

law. What Your Honor is going to have to decide here is do the four corners of these promissory notes beg for extrinsic evidence. Is the four -- in the four corners of these promissory notes, is there ambiguity? Did Mr. Dondero agree to repay the Debtor the amounts owed to the Debtor on demand? And all you have to look at for those are the two-page demand notes that are in the evidence right now, Your Honor.

No references to the Tax Code. No need to refer to the Tax Code. In fact, the only case that's been cited from a tax court is the case, I think it's called *Salloum,* which is cited in Mr. Dondero's responsive papers. And in that, the Tax Code -- that case says that what you have to do to determine whether or not these notes are forgivable under tax purposes is a fact matter. It doesn't refer back to the Tax Code.

And what that case said and what the cite that Ms. Deitsch-Perez, excuse me, Mr. Dondero's counsel said, put into the document is that the factual things that you look at is was there a written agreement, was there a promissory note, was collateral issued, does the asset show up as an asset on the Debtor's books and records as a loan or as a forgivable loan? None of those determinations require an analysis under the Tax Code, and there's been no allegations or no statements that it does.

Those factors are the same factors that Your Honor would look at for a motion to recharacterize. It's not a unique

thing.

There is no determination of Mr. Dondero's tax liability. There's nothing. And there's no references to it. We haven't had a case cite yet or a statutory cite yet for a statute that you're going to have to interpret and analyze. There is literally nothing, Your Honor. There are two-page demand notes that make no reference to the Tax Code. The only thing Your Honor will have to do is determine whether or not they're ambiguous and whether or not Mr. Dondero was given the money and has an obligation under those two-page documents to pay that money back.

Moving on from that, Your Honor, because I do think we need to level-set a little bit on the other facts on this case, because there were some things that were said that maybe stretched it a little bit. You know, specifically, Your Honor, the adversary really does deal with demand notes, two-page demand notes, and then one term note which is also two pages. Those demand notes and those term notes are indisputably property of the Debtor's estate. Those demand notes and those term notes at issue here were included on the Debtor's schedules that were filed in December 2019 when Mr. Dondero was in control of the Debtor. They were filed in December 2019 when Mr. Frank Waterhouse, the Debtor's then-CFO, was firmly in control of the Debtor's financial operations. They were included on the schedules. Nobody

objected.

Those notes have been included on the MORs every single month in this case, including the months prior to the appointment of the independent directors. The notes are included as an asset on the Debtor's books and records. And as I mentioned earlier, the notes are included on the plan projections that were filed in support of the Debtor's disclosure statement and plan of reorganization.

Nobody has challenged these notes. Nobody has challenged the MORs, the plan projections, which showed these tens of millions of dollars in notes as a material asset of the Debtor's estate. And that in and of itself is interesting, Your Honor, because everybody in this courtroom objected to the Debtor's disclosure statement and the Debtor's plan, including objections to those plan projections, but they never challenged these notes as an asset of the Debtor's estate.

And Ms. Canty, if you're on, can you please put up Exhibit 1, please, or Slide 1?

As she's doing that, Your Honor, just briefly, Mr. Dondero owes the estate $9 million under three demand notes. The demand notes were issued in 2018, and as I said, they're each two-page notes. They were executed by Mr. Dondero, and there's no dispute that Mr. Dondero got the money. And as you can see, Your Honor, this is the only payment term, the one that's on the screen right now, that says accrued interest and

principal on this note shall be due and payable on demand of the Payee.

On December 3, 2020, demand was made, and Mr. Dondero has refused to pay. The notes are accelerated. The notes are not in dispute. And the amounts due under the notes, Your Honor, are liquidated. It's principal plus interest plus the costs of collection.

If we can turn now to NPA, NexPoint Advisors, which, Ms. Canty, is the next slide.

This term note was issued in May 2017. Pursuant to the term note, NexPoint borrowed $30 million from the Debtor. The term note was executed by Mr. Dondero in his capacity as the control person for NexPoint. As you can see very clearly here, the notes were payable in annual installments on December 31st of each calendar year.

It is not disputed that on December 31, 2020, a payment was not made. On January 7th, the Debtor sent a notice to NexPoint Advisors, notifying them that they were in default and that the notes were accelerated. The notes, which are property of the estate, are due and payable.

It's also not disputed that shortly after the Debtor sent that note, NexPoint Advisors tried to make a payment, and that payment was applied to past-due interest and principal, in accordance with the terms of the notes.

NexPoint controlled the ability to make payments on these

notes, and chose not to. Again, Your Honor, the amounts due under this note are liquidated. Principal plus interest plus the costs of collection.

Finally, Your Honor, -- and Ms. Canty, if you can go to the next slide -- Highland Capital Management Fund Advisors borrowed $7.4 million from the Debtor in May of 2019 under two promissory notes. And as you can see on the footnote here, Your Honor, these aren't the only debts that are owed by Highland Capital Management Fund Advisors to the Debtor. Highland Capital Management Fund Advisors, we'll just call HCMFA, issued two other demand notes in favor of the Debtor, and those were earlier, and there's a prior agreement that says the Debtor would not demand payment on those notes until May 31st of 2020. That's the only reason they're not at issue here. And you'll see in the Debtor's schedules that these notes were included in the aggregate amount owed by Highland Capital Management Fund Advisors.

Again, Your Honor, the Debtor sent a demand note on December 3rd. The notes were not paid. The notes are accelerated. The notes are due. And the damages under the notes are liquidated. Principal plus interest plus the cost of collections.

In each case, Your Honor, and you'll understand that -- excuse me, Your Honor. The underlying agreement in each of these cases is a note instrument. It's a debt instrument.

Has there been a breach? Yes, absolutely.

And Ms. Canty, you could take that down now, if you want.

There has been a breach. The breach is the Debtor's failure to pay. And there are damages. The damages are, again, principal, interest, and costs of collection. And that's all that needs to be determined. There's no need for Your Honor to create a liability here. This isn't a contract where Your Honor has to assess whether or not a supplier supplied widgets. This isn't a contract where Your Honor has to do a factual analysis and determine the damages. There is a debt here, and it's a liquidated debt that is owed to the estate.

That, Your Honor, is how we get to Section 542(b). In each adversary proceeding, the Debtor has --

THE COURT: Let me stop you there. I mean, it's not really liquidated, though, right? You said there is a liquidated debt. Now, you're saying, oh, it's slam dunk, we'll win on the breach of contract. That's your idea of this. So treat it as liquidated.

MR. DEMO: Well, no, I think --

THE COURT: But it's not liquidated. Your opposing counsel says that's a problem.

MR. DEMO: There's an amount owed under the note. Well, Your Honor, I guess there's a slight distinction. The notes are disputed. The obligation to pay the note are

disputed. The amounts that were lent on the notes are just simply on the face of the notes.

And I guess, jumping ahead, Your Honor, the fact -- and you've heard it before, and you, I assume, will hear it again -- the fact that the notes were disputed doesn't take this out of the realm of 542(b). And Mr. Dondero's counsel cited to *Collier's*, and *Collier's* is clear on this and the case law is clear on this. The fact that there is a dispute does not mean that 542(b) is not a correct mechanism to collect on a matured note, a note that's payable on demand and a note that's property of the estate.

And Your Honor, and I'll get into the case law, and maybe I should just jump into it right now, but that's what, for example, the Southern District of Texas found in 2018 in affirming a bankruptcy court case in *Tow*. In *Tow*, the facts were that there was an account receivable owed to the Debtor. The Debtor brought an action under 542(b) to recover that account receivable. The account receivable was challenged. The defendant said he didn't owe the money because there was a settlement agreement in place and he just didn't have to pay. But the Bankruptcy -- I'm sorry, the District Court there, affirming the Bankruptcy Court, said that because the account receivable was property of the estate, that 542(b) was the correct mechanism for the estate to collect on that, despite the fact that there could have been a state law action if the

Debtor weren't in bankruptcy.

THE COURT: Let me stop you there, --

MR. DEMO: In ruling that way, --

THE COURT: -- because I went back and pulled that case earlier today, --

MR. DEMO: Uh-huh.

THE COURT: -- because, you know, I'm going to get a little bit concerned if the Southern District of Texas goes a different way than the Northern District. And of course, we don't have a Fifth Circuit opinion on point. So gee, let's see --

MR. DEMO: Right, Your Honor.

THE COURT: -- different *Tow v. Park Lake* was. There are a couple of nuances I read that I think maybe matter. It --

MR. DEMO: Okay.

THE COURT: The Court talks about -- starts out talking about, in the very first sentence, that there had been a settlement agreement between the bankruptcy trustee and Park Lake, and then Park Lake, who owes money under the settlement agreement, later receives proceeds from a utility company, reimbursement of some sort, and then the Trustee asserted a claim for turnover of that reimbursement under 542. And then, meanwhile, Park Lake files a motion to hold the Trustee in civil contempt for violating the settlement agreement.

So, while Judge Rosenthal didn't make a big deal of these facts in distinguishing her opinion from the Northern District *Satelco* case, these do seem like rather important facts to me, that there was a settlement agreement where account debtor Park Lake is saying, okay, I agree, I owe you *x* amount, and then later Park Lake gets some sort of proceeds of a utility reimbursement, and then now all the Trustee is doing is seeking turnover of that reimbursement. That feels very different than --

MR. DEMO: Well, --

THE COURT: -- a suit on a note, even if --

MR. DEMO: -- it is different.

THE COURT: Even if you think it's slam dunk, no defenses are going to prevail at the end of the day, we do technically have a breach of contract action that you must prevail on first.

MR. DEMO: Well, Your Honor, I mean, yes. Is *Tow* different on the facts? Yes. It's an accountant receivable. It's not a note.

The fact that the amount -- the amounts were arguably owed under the settlement agreement, you know, that was disputed. If it hadn't been disputed, the amounts would have just been turned over to the estate. The fact that there was a fight over it means that there was a fight over it.

But Your Honor, I mean, I think possibly the more

instructive case here is a case called *Faulkner v. Berg*, which is actually out of the Northern District of Texas. And it's a 2006 case from Judge Houser. In that case, there was, Your Honor, a promissory note at issue. The Chapter 11 trustee brought an action against a man named Berg because Berg owed the estate money on a promissory note that was issued to Berg in connection with -- I'm sorry, that -- not -- that Berg owed the estate as compensation for certain services that he received.

The Chapter 11 trustee brought an action on that promissory note, and the complaint that the Chapter 11 trustee filed included a breach of contract claim and a turnover claim under 542(b). Mr. Berg brought a number of affirmative defenses, and Judge Houser still held that that was a core proceeding under 542(b). And it's a 2006 case, a case that was issued after *Satelco*. And notably, Your Honor, it just honestly doesn't discuss *Satelco*. It doesn't address it at all. It just finds that the action on the notes was a core proceeding.

And now, Your Honor, the -- Mr. Dondero, in his responsive papers, --

THE COURT: What case was that again? I just don't remember this case.

MR. DEMO: It was *Faulkner v. Berg*. And I can get you the case cite, if you'd like.

THE COURT: Okay. Maybe I do remember it. I just --

(Pause.)

MS. DEITSCH-PEREZ: If I can direct the Court's attention, there's also a subsequent case that I think the Debtor was about to acknowledge.

THE COURT: Okay. We'll let you have your rebuttal.

MR. DEMO: Yeah. And I can -- instead of --

THE COURT: Okay. Go ahead, Mr. Demo.

MR. DEMO: Yeah. Instead of getting you the case cite, Your Honor, I do think that subsequent case is important, because Mr. Dondero cites it for the fact that the District Court overruled the *Berg* court and found that motion to withdraw the reference in that instance was correct.

But what Mr. Dondero neglects to say is that the action to withdraw the reference that was brought to the District Court was actually the second action. The first motion to withdraw the reference brought to the District Court was denied. The second motion to withdraw the reference was granted, but based on entirely different facts. Because Berg also had third-party claims against a nondebtor, a guy named Kornman. By the time that the case got to the District Court, the debtor's claims on the promissory note against Berg had been resolved. The only parties left in the adversary were Berg and Kornman, non-debtors, and the only actions left in the adversary were non-core actions.

In addition, Your Honor, both Berg and Kornman agreed to withdraw the reference.

So I understand why Mr. Dondero cited it, as kind of a bit of a gotcha case, but it doesn't actually stand for the proposition that the Northern District of Texas withdrew the reference when the underlying complaint was a breach of contract and a turnover claim under 542(b) that was brought in an adversary proceeding to collect on a note.

And Your Honor, these cases aren't outliers. There are cases from other districts that stand for the same thing, and they stand for the proposition that the collection of a note is an appropriate remedy under 542(b), despite the fact that there may be affirmative defenses to that note.

And the case that I would direct Your Honor to and then pivot from real quick is the Second Circuit Court of Opinions [sic] case in *Willington Convalescent Home*. That case was cited with approval in *Tow*.

But the case that I want to focus on, because I just think there is a great quote from it, is a case out of the Eastern District of Virginia. It's a 2020 -- 2012 case, excuse me -- called *In re Connelly*. In that case, the debtor sued, seeking turnover on a series of notes, and the defendants filed answers denying the indebtedness and asserting nine affirmative defenses challenging the validity and enforceability of the notes.

The defendants also argued, as they do here, that a turnover action -- I'm sorry -- that the action couldn't be core because it was disputed. And I want to read a quote from the *Connelly* court, which says:

> "While the Defendants assert that they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. It is sufficient if the complaint alleges the existence of matured debt. For an action to be a turnover proceeding, it is not relevant that the Defendant disputes the existence of a debt by perhaps denying the complaint's allegations, as long as those allegations state the existence of a mature debt. A cause of action is a turnover proceeding under 542(b) of the Bankruptcy Code where it seeks the collection, rather than creation or liquidation of a matured debt."

And *Connelly*, Your Honor, is consistent with *Tow*, and it's consistent with case law from other circuits, and it's also consistent with *Collier's*. Mr. Dondero's counsel cited to the 157(b)(2)(E) section of *Collier's*, but Mr. Dondero's counsel neglected to cite to the actual *Collier's* section on 542(b), which says that 542(b) does not on its face say it does not apply to disputed claims and that 542(b) does apply to disputed claims. As long as there is a debt which is property

of the estate which is matured, which is payable on demand, 542(b) is the correct mechanism for the estate to collect on that debt.

Those are exactly the facts here, Your Honor. The fact that there is a breach of contract claim right alongside that doesn't change that, because it's black letter jurisdictional bankruptcy law that just because there are state law issues implicated, if an action is core, if it arises under or arises in a bankruptcy statute, the bankruptcy statute governs and creates the bankruptcy court jurisdiction. State law issues come up in core matters all of the time and it does not make those matters non-core.

That's simply the case here, Your Honor. 542(b) is a bankruptcy court provision that provides that a trustee can seek an action to recover on a matured debt. All of the actions here are matured debts. Do the people have -- or, excuse me, did the Defendants have defenses? Yes. But if you look at our complaints, they were properly pled. We pled the existence of a debt. We pled a proper turnover action. They're payable-on-demand notes, and demands have been made. They fit squarely under 542(b).

And because they fit squarely under 542(b), they are core, they are equitable, meaning no jury trial right exists, and Your Honor has the authority to issue a final order on these matters.

And if you look at, you know, turning briefly to the *Satelco* case that Mr. Rukavina cited and the *Satelco* case that Dondero's counsel cited, that is a 1986 case. It's been cited three times in the Northern District of Texas, and I will concede that it's a Northern District of Texas case. And I'll also concede, Your Honor, that it stands for the proposition that you need a final judgment in order to use 542(b). I think that's very narrow. The majority of cases or courts throughout the United States have found that too narrow, and quite honestly, it just hasn't been followed. *Satelco* has been cited in 1986 in its own -- I mean, not cited. *Satelco* was written in 1986. It was cited in *Fang*, which is a 1993 case, and *Fang* really followed the analysis in *Satelco*. And then it was cited in *Moran* in 2006. The *Moran* cite was basically just a string cite, Your Honor. It gave no real analysis.

2006, Your Honor, was also the year that Judge Houser entered the *Faulkner v. Berg* decision which we discussed earlier, which did not even address the *Satelco* opinion. Since 2006, I haven't found any instances where it's cited in this district with approval.

The only cases in the circuit that I have found are the cases like *Tow*, which address it and distinguish it and say that it's in the minority.

Your Honor also heard cases where Mr. Rukavina said, you

know, you can't use Section 542(b) to collect on a contract claim. And Your Honor, you know, that's right. If this were a breach of contract claim in a traditional sense, or an M&A agreement or a supply agreement, where Your Honor would have to determine the responsible party, who actually breached the agreement, where Your Honor would have to do detailed factual analyses of what the damages would be, okay, you know, I can't not say that that would fall out of 542(b), arguably.

But again, Your Honor, that's just not the case here. The case here is squarely under 542(b). We have two-page notes that are unambiguous. We have two-page notes where the Defendants have admitted that they got money from the estate, with the promise to pay it back on demand or to pay it back in accordance with its terms. And yes, they have defenses. But again, Your Honor, that does not take it out of 542(b).

And *Satelco* is -- it's just not current law and it's just not followed in this circuit and it's not followed, quite honestly, throughout the United States.

THE COURT: Okay. Let me --

MR. DEMO: But even if --

THE COURT: Let me ask you, and maybe I'm interrupting at a time you were about to get into this, but if I accept your argument as correct that, you know, *Satelco* got it wrong and I should follow the courts that have said 542(b) sort of, I don't know, trumps, supersedes, a breach of

contract cause of action on a note, so, following your logic, that would mean this is arising under the Bankruptcy Code, *i.e.*, 542(b) and core matter, we still have the jury trial right problem, correct?

MR. DEMO: No, not correct, Your Honor.

THE COURT: Because even though it's statutory core under your argument, we still look at *Granfinanciera*, *Langenkamp,* and we go back and look at would the court of law versus a court of equity have tried this suit --

MR. DEMO: Yes.

THE COURT: -- and is there legal remedy you're seeking versus an equitable remedy. And so, you know, even in a preference suit, for example, core, core, core, they're entitled to a jury trial --

MR. DEMO: And --

THE COURT: -- if they didn't file a proof of claim.

MR. DEMO: Understood, Your Honor. And I just don't think that's the case here.

I mean, again, looking back to the *Tow* court, the *Tow* court actually addressed this issue, and the *Tow* court found that 542(b) -- and again, this is consistent with other case law and other courts -- creates an equitable remedy. It doesn't create a legal remedy. And because it creates an equitable remedy, the *Tow* court found that the jury trial right did not exist. And it found that a jury trial right did

not exist despite the defendant arguing that the action was a suit for money damages. You know, it wasn't a suit to turn over a car or anything like that; it was actually a suit for money damages. And the District Court in *Tow* said that the suit for money damages did not mean it wasn't an equitable remedy because it arose under 542(b) and a jury trial right did not exist.

So I would, I guess, challenge your premise there a little bit, Your Honor, because I do think that the case law is pretty clear that 542(b) creates an equitable remedy without a jury trial right.

THE COURT: Okay.

MR. DEMO: And with that, Your Honor, I will move on and pivot and say, you know, even if this weren't a core matter and even if a jury trial right existed, that the other *Holland America* factors weigh heavily in favor of Your Honor keeping this case for as long as possible. And I know that wasn't the most elegant pivot, but, you know, I do -- I am conscious of this Court's time.

You know, first, Your Honor, the jury trial right, we didn't press it in our papers. Did Mr. Dondero file a 553 action in his complaint, which arguably creates the claims allowance process, and then recant it? Yes. But leaving that aside, looking at forum-shopping, you know, the Defendants argue that we're the ones forum-shopping here. The Defendants

argue that the Debtors are forum-shopping by having filed these actions in that court. It's difficult to respond to that, Your Honor, because where else would the Debtor have filed these actions?

I can't think of any case I've seen where the debtor is owed money that arose -- that maturity occurred postpetition, and the debtor went out to state court in Texas or state court in Mississippi to collect on those debts. Those actions are always brought in the Bankruptcy Court.

The Bankruptcy Court was created as a court, as a forum, to marshal the assets of the estate, to adjudicate disputes, and then to push those assets out to creditors. It just doesn't make sense to say that the Debtor is forum-shopping by using the forum created for the Debtor under the Bankruptcy Code.

The distinction, Your Honor, and I don't want to belabor this point too much, Mr. Dondero and his affiliate entities have shown that they want nothing more than to not be in this court. They've filed recusal motions. They've filed withdrawal of the reference in this case, in these cases. We anticipate they'll file withdrawals of the reference in the other notes actions. They filed a withdrawal of the reference in the CLO Holdco-UCC dispute. Mr. Dondero's controlled entity, the DAF, recently filed an action in the Northern District of Texas seeking to functionally re-litigate the

HarbourVest settlement and to hold Mr. Seery responsible for breach of fiduciary duties.

We recently found out that Mr. Dondero's other related entity, which was a very, very small LP in the Select Fund, has filed a suit in the Northern District of Texas, seeking to hold the Debtor liable for mismanaging multi -- or, sorry, Select Fund with respect to the sale of Trussway and SSP, two names Your Honor may remember because they came up in December in the context of the hearing you had on the CLOs seeking to prevent Mr. Seery from exercising his authority under the CLO management agreements.

And I do want to be clear, Your Honor, that this new case did not name Mr. Seery as a defendant, but it's still there. This is happening. Mr. Dondero and his related entities do not want to be here. They are forum-shopping.

And I would push Your Honor to look at the Western District of Texas case *Citibank*, which says that the best way to deal with forum-shopping in a withdrawal case is to wait to withdraw the reference until the absolute last moment, so that no party can be said to be forum-shopping. No party can be looking at this Court's orders and saying, oh, this is a good one, this is a bad one, let's withdraw the reference.

This is the appropriate venue for this, and this is where it should be held and should be adjudicated, up until the last minute.

And I should have said this from the beginning, Your Honor, that Your Honor absolutely has jurisdiction. At a bare minimum, related-to jurisdiction, because these assets are a core asset of the Debtor's estate. The Debtor is in a monetization plan. Collecting these assets and distributing these assets out to the creditors is what the Debtor is doing. And so there is, at a minimum, related-to jurisdiction.

There are also efficiency concerns that we really need to address here, Your Honor.

THE COURT: You're fading. Your audio is fading.

MR. DEMO: Oh. Is this any better?

THE COURT: Yes. Uh-huh.

MR. DEMO: Okay. There are also judicial economy issues that favor keeping the case here, Your Honor. I mean, the case has obviously been pending for 20 months. That's not new to anybody. The relationship of all the parties in this case is very important. The case is complicated. The parties in this case are complicated. And understanding those is going to be a key component of actually understanding any action, even a simple two-page note action.

This Court -- there are also 19 separate litigations, I believe, currently pending with Mr. Dondero and his entities, and Your Honor has dealt with all of those in an expeditious manner. When something needs to be heard on an emergency matter, Your Honor has made herself available, and we

appreciate that. Your Honor has entered orders in a timely manner, and Your Honor has dealt with the complicated things in this case in a timely manner. And we would ask Your Honor to keep doing that.

Because, in distinction, the District Court has other things to do. There are criminal cases. There are other cases. The District Court is not a court that wants to focus just on this case. And the District Court's treatment of this case is evident, I think, Your Honor, by the way that they treated the stay motions that were filed. We still don't have a ruling on them and we never will have a ruling on them because we've passed that by and we're in the Fifth Circuit now.

This Court was created to marshal the Debtor's assets and to adjudicate disputes and to allow for the distribution of assets to creditors. We would ask that Your Honor keep it for that reason, among others.

We've also, as we talked about earlier, we are very close to finishing discovery. We've had multiple depositions. We will -- or, I'm sorry, not multiple -- we've had Jim Seery's deposition. We have Mr. Dondero's deposition. There are document productions that are occurring. And Your Honor, these cases are scheduled to be heard within the next 90 to 100 days.

We need a resolution on this matter so that we can make

distributions to creditors. This Court is the best court to do that. There is just literally no time to wait for the District Court to get around to hearing -- in the district -- I mean, to hearing this matter.

And finally, Your Honor, I think, you know, we can draw some inferences here. We can draw some inferences that, you know, there is some forum-shopping going on. There is the desire to burn some assets. That also weighs into the judicial economy, Your Honor, to not allow additional estate assets to be wasted running this Court -- running a very simple proceeding up and down to the District Court. Your Honor has the authority to enter non-final orders, including orders on partial summary judgment, including orders on evidentiary matters. Based on those orders, we quite honestly don't think there will ever be a need for a jury trial, and we would ask Your Honor to keep this case for as long as possible in order to enter those orders, in order to provide for an expeditious resolution of this matter.

Unless Your Honor has any questions, I think that's it for me.

THE COURT: All right. No more questions at this time. I am going to come back to that Trussway matter before we finish today. All right. So, words in rebuttal.

MR. RUKAVINA: Thank you.

THE COURT: Mr. Rukavina?

MR. RUKAVINA: Thank you, Your Honor. Thank you, Your Honor. I'll be brief.

Let me address the case, the *Faulkner v. Berg* case.

THE COURT: Okay.

MR. RUKAVINA: Because I think there's a valuable lesson to learn from this case, Judge. And here is the whole extent, and I mean literally every molecule, of what Judge Houser wrote: "The complaint contains a claim for breach of contract and a claim for turnover of property of the estate under 542. These two are core claims pursuant to 28 U.S.C. 157."

That's it. That's all she wrote. Now, is Judge Houser an inattentive judge? Is she a stupid judge? Absolutely not. But she wrote this in 2006, five years before *Stern v. Marshall*, Your Honor.

Similarly, Judge Felsenthal -- I'm sorry, Judge Abramson wrote the Sel -- the --

THE COURT: *Satelco*.

MR. RUKAVINA: -- the satellite case.

MS. DEITSCH-PEREZ: *Satelco*.

MR. RUKAVINA: Thank you. Two or three years after *Northern Pipeline*. And that's my point. And it seems like trustees and debtors sometimes forget the painful lessons of the Supreme Court's precedent, and then we're all shocked when a case like *Stern v. Marshall* comes down and we're all

shocked, because we've been led down the road for years and years and years of whittling away here and whittling away there, that at least the U.S. Supreme Court finds these things of paramount importance. So that's what we're dealing with today.

So Mr. Vasek, will you please pull up the HCMFA notes?

So, I do not purport, Your Honor, to have a mini-trial today on the merits of anything. That's not what this is about. But Mr. Demo brought up a couple notes, so let me -- let's go look at the HCMFA notes, Your Honor.

MR. DEMO: Are these -- are these notes going to be put into evidence?

MR. RUKAVINA: These are attached to the complaint, sir.

MR. DEMO: And we don't have an objection.

MR. RUKAVINA: These are attached to your complaint.

MR. DEMO: Oh.

MR. RUKAVINA: Didn't you -- didn't you quote from them earlier?

So Mr. Vasek, will you go to the signature page?

Your Honor, look at that. Maker: Frank Waterhouse. That's what these notes are. Maker: Frank Waterhouse. I would survive summary judgment today if all they did was they told you, look, Judge, give me my $7.54 million. I'd say, well, who in the world is Frank Waterhouse? Of course, we all

know who he is. But look at how he signed that. Not as a representative capacity.

So what Mr. Demo is saying, Judge, forget about what Mr. Rukavina just said. Forget about these defenses. Forget about looking at the facts. Forget about looking at Mr. Waterhouse's actual or apparent authority. Here's a note. Pay me. Oh, and if you don't pay me, it's contempt of court. That is what he is trying to get the Court to do, by saying that 542(b) somehow does away with the need to use -- I think Your Honor said it -- to liquidate a claim. And as soon as we start that process of liquidation, we get into the whole issue of who's going to be our fact-finder. Is it going to be a jury? And who's going to be our judge. Is it going to be an Article III or an Article I judge?

I did not create the Article I/Article III distinction. I would love it if every bankruptcy judge was an Article III judge. I think having these hearings and so many contentious adversary proceedings is a gross, gross waste of all of our times. But this is the mechanism that Congress has created. And if we mess with this mechanism, we're just inviting trouble.

And, of course, any party that comes before a judge, whether it's a reference withdrawal or whatever, of course there's always underlying strategy. Of course parties would prefer to be in front of one court or another. That's not

gamesmanship. That's not forum-shopping. The Debtor could have filed a suit and a sworn account in a Dallas court and I bet they would have already had a judgment by now, probably, given how a suit and a sworn account works in Texas. But they probably didn't talk to their local counsel about Texas procedure.

So all of those things wash out. Every litigant in front of you has an ulterior motive, Your Honor, which is that they want to win. What matters is the Court's jurisdiction. What matters is the Seventh Amendment. What matters is the jury right. And what matters is 542(b).

I think Your Honor has, through her questions, suggested that she doesn't buy the argument that 542(b) can be used to liquidate a disputed claim. I hope that the Court will reaffirm that.

And while I understand that the usual practice is that the bankruptcy judge stays on board for pretrial matters, I understand that there's a lot of wisdom to that practice in other cases, here, I think because this Court has so much going on in this case already, and these note cases really are different, they really don't have a large universe of discovery, they really are divorced from the bankruptcy case, I respectfully submit it's in everyone's interest to have the District Court enter its orders throughout this case and not have to revisit potentially every order that this Court enters

in the interim before we get to trial.

Thank you, Your Honor.

THE COURT: All right. Do you have any comment about the -- I think it was Eastern District of Virginia case that Debtor argued? Drawing a blank on the name.

MR. DEMO: No, Your Honor.

MR. RUKAVINA: Your Honor, I do not have any discrete comments on it. I would just point out that you're -- the Court is right. The Fifth Circuit has not addressed this issue. But I have briefed, and it's black letter in those cases, the D.C. Court of Appeals, the Eleventh Court of Appeals, and the Eighth Circuit Court of Appeals. So those are three court of appeals that agree with *Satelco*, and not a single court of appeals holds otherwise. And as Judge Dodd taught us when --

THE COURT: I take it there's a Second Circuit case that holds otherwise, right?

MR. RUKAVINA: That's what the Debtor has briefed, yes. I apologize.

THE COURT: Uh-huh. Uh-huh.

MR. RUKAVINA: That's what the Debtor has briefed. But again, I go back to just thinking about it conceptually. If Congress says, okay, you have a breach of contract case, you have a promissory note case, and Congress says, I want to slap my own label on it and I'm going to assign it to an

Article I court to enter a final order, and I'm going to strip you of your jury rights because it's equitable, Your Honor, that's -- that's exactly what *Northern Pipeline* was. That's exactly what *Stern v. Marshall* was.

With due respect to the Eastern District, with due respect to the Second Circuit, it's common sense, Your Honor. Congress cannot take something that is a constitutional right, that is a common law right, and just give it a label, and because of its label somehow do away with 250 years of constitutional law.

THE COURT: Thank you. All right. Any last words, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: Yes. I think I can answer your question about -- I think you were asking about *Willington Convalescent Home*?

THE COURT: Right.

MS. DEITSCH-PEREZ: Which was the case the Debtor referred to. Well, first of all, it's a 1988 case, so pre-*Stern v. Marshall*. And I believe the only claims that were brought in there were turnover and preference. And so it's, in any event, distinguishable from the case here, which is a contested contractual matter.

And to that end, while, like Mr. Rukavina, I'm not trying -- I'm not going to try the case here, I do want to point out that there are defenses, there are real defenses. And so for

that reason I would like to -- let me pull up one of the notes. So, if I can share my screen. Okay. Are you able to see my screen now?

THE COURT: No.

MS. DEITSCH-PEREZ: Okay. Can you see it now?

THE COURT: Yes.

MS. DEITSCH-PEREZ: Okay. So this is one of the three notes. And this is what I referred to earlier and what the Debtor would like to ignore. The Debtor keeps saying these are two-page notes. There's nothing to them. There are no defenses. But what Mr. Dondero has alleged is that there is a subsequent agreement that put conditions, conditions subsequent that would cause the note to be forgiven. And they relate to the sale of the portfolio companies. I don't know if you saw it in the newspaper that MGM may be sold to Amazon for $9 billion. So you will hear, when you hear Mr. Dondero testify, if you hear it, or the District Court will hear that these notes were to be forgiven under certain circumstances.

And so, first of all, the Debtor alluded, without saying so, to the parol evidence rule. Obviously, a subsequent agreement can be proven up. The parol evidence rule does not prevent that. That's a live defense. And in addition to that, you can certainly have parol evidence if your note is ambiguous. And while the note does not say anything about the conditions -- and the reason it didn't is rooted in tax law,

because in order for the note not to be immediately taxable as income to a party, it has to be a valid note at the time and the forgiveness has to be based on events that are not entirely in the borrower's control, and that's -- that's what the fact-finder will hear about.

And if you look at each of the notes -- in the first one it's in Paragraph 8; I think in the others it might be in Paragraph 7 or 9 -- the note refers to the existence of other agreements. And that is consistent with there being a subsequent agreement that the notes would be forgivable under certain circumstances that related to the portfolio companies.

So, to be clear, there are issues to be tried here to a fact-finder. The Debtor admits that the tax determinations are also intertwined with factual determinations. And that's our point, that you have to know the tax law relating to when a note is a bona fide loan at the start but can be compensation under certain circumstances. And we will have expert testimony on that. That is something Mr. Dondero is entitled to try to a jury in the District Court.

Thank you very much for your time and attention.

THE COURT: Thank you. By the way, --

MR. DEMO: Your Honor, with apologies --

THE COURT: -- we both -- well, the Eastern District of Virginia case that I was asking about was *Connelly*. *Shaia v. Taylor (In re Connelly)*. It was a 2012 case. So that was

the one I was wondering if either you or Mr. Rukavina could specifically address.

(Pause.)

MR. DEMO: And Your Honor, that case -- there are other cases that support that proposition as well. I don't need to go through them chapter and verse, but they all stand for basically the same proposition.

MS. DEITSCH-PEREZ: I don't have that one particularly in mind, but this -- this falls right in line with what's in *Collier's*, that there are some courts across the country that have mistakenly and incorrectly used the turnover statute to unconstitutionally exercise jurisdiction over what is a non-core matter that should be able to be tried before a jury in the District Court.

THE COURT: All right. I just wondered if anyone could zero in on the facts of that case, because I --

MS. DEITSCH-PEREZ: No. But may I -- may I have the opportunity to look at it, and if there is a particular distinction we should bring to your attention in a very brief letter, do it after the hearing?

MR. RUKAVINA: Well, Your Honor, --

MR. DEMO: Your Honor, I think --

MR. RUKAVINA: -- I remember -- I have that case in front of me.

THE COURT: Okay. Everybody's talking --

MR. RUKAVINA: I have the case in front of me.

THE COURT: You have the case in front of you? Is that what you said?

MR. RUKAVINA: Yes, Your Honor. And I do remember -- I do remember reading it, and it does stand for the proposition that Mr. Demo says, --

THE COURT: Okay.

MR. RUKAVINA: -- which is that a disputed debt, a disputed claim, does not remove the claim from the operation of 542(b) and from it being core. And I think what Ms. Deitsch-Perez started telling you is that it's just wrong. It's just a wrong case. Because, again, it ignores the -- it looks at is this statutorily core, and it says it's statutorily core, and it doesn't look at the fundamental constitutional issue.

But I will quote this case right now, Your Honor, and here's the -- the key of it. So, again, Mr. Demo is correct that it says that whether the debt is disputed or not doesn't matter. But here's what he -- the Court says: "A cause of action is a turnover proceeding under 542(b) of the Bankruptcy Code where it seeks the collection rather than the creation or liquidation of a matured debt."

That goes to Your Honor's point. You have to have the liquidation of a debt. A promissory note is not a judgment. A promissory note is a means to a judgment. You have to

liquidate that promissory note.

MR. DEMO: Your Honor, this is Greg Demo. I'll take issue with that. That's just impossible, Mr. Rukavina's construction of that case. You can never have a final judgment on a note if that note is also disputed. You have to resolve the dispute first.

What that case says, and it's also in the *Tow* opinion, it's also in the Second Circuit opinion, it's also in the case out of the Western District of North Carolina, I think, what that court says is that 542(b) can be used to collect on a debt even if that debt is disputed. If what that means, that you have to have a final judgment on the debt before you can use 542(b), that language means nothing. Because how can you have a debt that's disputed and also have a debt that has a final judgment on it? The language says what it says, and it applies here.

And Your Honor, I point you to, quickly, the *Tow* case, and I'll read you a quote from the *Tow* case which cites to that Second Circuit case that I referenced. It says, "*See, example, In re Willington Convalescent Home, Inc.*" And the quote from *Willington* is: "The mere fact that Connecticut denies that it owes the matured debt relating to the services because of a recoupment right does not take the Trustee's actions outside the scope of Section 542(b)." That's the quote in *Tow*. That's the quote in in the Southern District of

Texas.

Does it have as much as the case that I cited from Virginia? No. But it has the exact same substance, Your Honor. And what that means is that *Satelco* has to be wrong because you cannot have a dispute on a debt and allow that dispute to be heard under 542(b) if 542(b) requires a final judgment. It just doesn't make sense.

And Your Honor, while I have you, I do want to address the *Stern v. Marshall* issue. Because this Court is not going to cause friction under *Stern v. Marshall*. The *Tow* court addressed *Stern v. Marshall* and found that, despite the fact that there were state law issues, again, the action was a 542(b) action and had no *Stern* implications. There are cases from this circuit, there are cases from other circuits, all of which have found that turnover is an appropriate means to collect on a matured note, even with disputes. If this Court follows that line of cases, this Court is not going to be creating a new *Stern* controversy, because that controversy already exists. Your Honor is not going to be creating a constitutional mess.

THE COURT: Do all of these cases you say support your position, do they say also no jury trial right?

MR. DEMO: Yes. They do, Your Honor.

THE COURT: And forget about *Tow*, because *Tow*, I think, is distinguishable. There was a settlement agreement.

The obligor on the settlement agreement got some sort of recovery. The trustee was seeking to turn over that recovery. That is very distinguishable in my view. Okay? There had already been resolution, liquidation, whatever you want to call it, of the amount due. It was purely, turn over this recovery you're getting, obligor, under the settlement agreement. I mean, that's very different.

But I feel like, even if 542(b) supersedes the breach of contract nature of your lawsuit, we still have this problem of there's -- you know, a suit on a note was tried in a court of law back in Elizabethan times, okay? It's a legal remedy you're seeking as well as an equitable remedy, liquidation of the claim as well.

MR. DEMO: It -- it --

THE COURT: I just feel like they're entitled to a jury trial.

MR. DEMO: And Your Honor, I guess what I would say to that is, well, one, even if they are, Your Honor doesn't need to withdraw the reference today and Your Honor should keep this for --

THE COURT: Okay.

MR. DEMO: -- as long as possible. Make dispositive findings, enter partial summary judgment motions, and all of that.

But what I would also say is that the language in 542(b)

-- and I'm sorry, I'm not facile enough to run through the cases on the fly -- 542(b) is the action that creates the equitable remedy. It doesn't matter what the underlying dispute is. If 542(b) applies, 542(b) is itself an equitable remedy. 542(b) is, per se, equitable, per se arises under the Bankruptcy Code, and it's that that vitiates the right to a jury trial. It doesn't matter what the underlying facts are if 542(b) applies.

THE COURT: Okay. All right. Well, I thank you all for your arguments. We've really gone into great depth here.

Here is what we're going to do. We are going to draft up three reports and recommendation for each of these adversaries, and I am concluding recommending to the district Court that the breach of contract claims here are non-core, and tacking a turnover claim under 542(b) onto them as Count II doesn't change the underlying nature.

So there's a split of authority, I understand, but I think certainly under *Stern*, *Marathon*, I think that's the better answer, that we have a non-core claim and a core claim, with the breach of contract being non-core.

I also think that there are jury trial rights here on behalf of the Defendants. Were it not for the fact that they withdrew their proofs of claim -- I mean, at one time, it appears, at least in the case of Mr. Dondero and, well, and in the case of NexPoint and Highland Advisors -- they had proofs

of claim that involved some overlapping issues with these notes. But they're gone now. And the fact that they're gone changes everything. So I do determine and am going to recommend to the District Court that there are jury trial rights here.

By the way, I'll address this issue with regard to the tax issues that are being raised by Mr. Dondero. I don't think there is substantial or material consideration of other non-bankruptcy federal law that would be involved here. But that's really irrelevant, I suppose, because I'm finding non-core jury trial rights, no consent by the Defendants, and so I'm going to recommend that the reference be withdrawn. But I am going to do what is the usual protocol and recommend that the reference only be withdrawn at such time as the Bankruptcy Court notifies the District Court that the matters are trial-ready, and therefore recommend the District Court defer to the bankruptcy judge to handle all pretrial matters.

The reality is you're either going to get a magistrate handling pretrial matters or you're going to get a bankruptcy judge. And I'm going to follow -- I see no reason not to follow the usual protocol in this district, where I recommend the bankruptcy judge preside over pretrial matters.

Last, with regard to the motion for stay that's only been filed in the Dondero adversary, I am going to grant a 60-day stay that will start after Friday. In other words, I'm not

going to suspend, interrupt discovery that is about to end in three days, okay? But I guess I'll say, beginning at midnight Friday night, I'll impose a stay, and it'll be a 60-day stay, and subject to further extensions, but I'm assuming that might be the approximate amount of time that it takes the district Court to either adopt or not adopt this Court's report and recommendation.

Again, this is -- I was going to say it's consistent with protocol. We don't always stay adversaries pending a decision on a motion to withdraw the reference, but as a practical matter, there ends up being a stay, because I will not rule on a motion for summary judgment until the District Court rules on a report and recommendation, because, for all I know, the District Court will want to yank the whole thing up. So that's my ruling.

MR. DEMO: And Your Honor?

THE COURT: Yes.

MR. DEMO: I'm very sorry to interrupt. Expert discovery, we're supposed to get an expert report from Mr. Dondero's counsel on Friday as well, and we just want to make sure that we have enough time built in to actually do a deposition of his expert and complete that part of the --

MS. DEITSCH-PEREZ: I would --

MR. DEMO: -- discovery process.

MS. DEITSCH-PEREZ: I would suggest that we stay the

provision of expert discovery until the District Court rules. The District Court may rule that it's taking everything, as the Court said, in *Great Western*, and so we ought to hold onto that.

MR. DEMO: Your Honor, we have a scheduling order --

MR. MORRIS: Your Honor -- Mr. Demo, let me just speak for a moment.

Your Honor, this is John Morris. I've listened patiently to all of this, and I apologize for interrupting. But the deadline for serving expert reports was last Friday. I graciously granted an extension until this Friday for personal reasons that I won't get into, but Mr. Dondero should not use our kindness as -- improperly here. We granted a one-week extension of time until Friday. They should produce the report. They should make their witness available. And otherwise, Your Honor, if you're going to stay it, you'll stay it, but they should complete what's been started, particularly since the only reason they have the right to serve the report on Friday is because we gave them that extension of time.

MS. DEITSCH-PEREZ: Yes, but --

THE COURT: All right.

MS. DEITSCH-PEREZ: But that is --

THE COURT: Just a moment while I read this. Okay. I was taking at face value that discovery completely ended this Friday, the 28th, but now I've got the order in front of

me and I see deadline for completion of expert discovery is June 7th, and that was premised on expert disclosures being May 21st, and now you're saying you've pushed that off to May 28th. And I guess, Mr. Morris, you're saying you'd like discovery to proceed on the experts through June 14th. Is that a recap?

MR. MORRIS: Yes, Your Honor. And again, the only reason we're even having this conversation is because the Debtor gave an extension of time, and that shouldn't be used against us. We should complete this discovery right now.

THE COURT: All right. Now, Ms. Perez, you were saying?

MS. DEITSCH-PEREZ: To be fair, Your Honor, --

THE COURT: Go ahead.

MS. DEITSCH-PEREZ: Yeah. To be fair, we asked for a stay long before the request for the extension for the expert report, which was for personal reasons. But we did ask for a stay to start with, and it's not abusing Mr. Morris's courtesy to say we still want that stay. We would have liked to have had that stay earlier. The motion for stay did not get -- was not set for hearing until today. We would have had it earlier. The Debtor would not consent. And then the Debtor didn't even respond to our motion for stay.

We just think it would make sense to include the expert discovery in the stuff that's held in abeyance that the

District Court may want to preside over.

THE COURT: Okay. The motion for stay was filed April 15th, so that was, you know, Lord knows, --

MS. DEITSCH-PEREZ: Long time ago.

THE COURT: -- people seek emergency hearings all the time in this case. What I had intended before I focused on this expert issue, I intended to let discovery play out, because it seemed to me we were close enough to the end of discovery that we ought not to put the brakes on it.

So I am going to let discovery play out as addressed in the current scheduling order. Okay? So the expert -- discovery on facts cuts off this Friday. The expert reports will be due this Friday. And deadline for completion of expert discovery, as I understand it, would be June 14th, pursuant to the one-week extension. Yes or no? Or did you all intend June 7th?

MR. MORRIS: I'm happy to work with counsel, Your Honor. John Morris for the Debtor. I'm happy to work with counsel to get this done before June 14th. It's not a problem.

THE COURT: Okay. So that's the ruling. I'll let discovery play out as we've just announced. But other than that, there is a stay, so no motions for --

MS. DEITSCH-PEREZ: Can I ask for a clarification?

THE COURT: -- summary judgment, no trial filings for

60 days after entry of the order.

And Mr. Demo, I'm going to ask you to upload a form of order on this stay ruling. But, obviously, my law clerks and I will do the three reports and recommendation.

You had a question?

MR. MORRIS: Your Honor?

MS. DEITSCH-PEREZ: Your Honor, I have a question about it, --

THE COURT: Okay.

MS. DEITSCH-PEREZ: -- if I may. We have -- we conferred today about some documents that the Debtor did not produce, and because of the results of the conference, we were about to file a motion to compel. It's very discrete. It's on the Highland audited financial statements that are literally a push of the button for the Debtor but they don't want to produce them.

MR. MORRIS: I can -- I can respond to that, Your Honor. We haven't had a chance to respond. But nevertheless, what I will say is that the Debtor will produce the audited financial statements for the sole purpose of disclosing information related to those notes. And, to the extent it exists, and I don't know that it does, Mr. Dondero's compensation.

We are not giving full audited financial statements. But to the extent that there's any information concerning the

notes or Mr. Dondero's compensation, we'll provide that.

MS. DEITSCH-PEREZ: That -- that -- what we also need, because our expert would like to have it, is the information about the assets under management. So anything that might relate to an executive's compensation. It's broader than what Mr. Morris is saying. So, --

MR. MORRIS: Your Honor, the Debtor will not agree to provide information about assets. It just won't.

MS. DEITSCH-PEREZ: Will it -- this is why we should be conferencing outside. But we would like the information about assets under management. It is not something that Mr. Dondero didn't already have a right to. He had them at the time.

THE COURT: All right. I don't --

MS. DEITSCH-PEREZ: There's no reason to --

THE COURT: I don't know what you want me to do or say, but I've allowed a lot of discussion, but I don't have a motion to compel in front of me and I don't intend to --

MS. DEITSCH-PEREZ: That was my question, Your Honor. May -- may we make that -- I mean, if Mr. Morris and I cannot reach agreement, we would like to be able to make that motion tomorrow so that it's on file before the close of discovery.

MR. MORRIS: Your Honor, if I may just be heard briefly. We're now told that this information is required for the expert. We didn't hear about an expert for the first time

until last week. We were told that they needed an extension of time. It was an understandable reason. We were happy to give the extension of time.

It's now Tuesday. The report is due in three days. And I am literally hearing for the first time that this information is required for the experts. I just don't want this to be used as yet another excuse for delay, because, you know -- I'll just leave it at that.

And we can talk after this, Counsel. We can talk after this. And if you want to make a motion, you can make a motion. But this should not be used as another basis for delay. The report was due last week. We got the request for an extension just a few days before that. And to hear now that they need this information for the report has me very, very concerned and suspicious.

THE COURT: All right. Well, --

MS. DEITSCH-PEREZ: And I think Mr. Morris --

THE COURT: -- yes, I'm done hearing about this. There is zero chance I'm granting a hearing on a motion to compel this week. And again, given that it is related to information supposedly the expert needs and we're already past the deadline for an expert, I mean, I don't know --

MS. DEITSCH-PEREZ: Your Honor, we asked for this many, many, many weeks ago.

THE COURT: Okay. Well, --

MS. DEITSCH-PEREZ: Okay.

THE COURT: -- maybe a motion to compel should have been filed many, many weeks ago. But I've let you know where I stand on this.

All right. So I will try to get these reports and recommendations out as quickly as possible.

I said I wanted to come back to *Trussway*. You know, we're not here on anything except these three adversaries today, but could you repeat what you said, Mr. Demo, about a new district court action filed by -- I'm not quite sure who was the plaintiff.

MS. DEMO: It was filed by the Sbaiti firm, which is the same file -- law firm which filed --

THE COURT: It was filed by who? Your audio is not great today.

MR. DEMO: The --

THE COURT: It was filed by who?

MR. DEMO: Oh. Sorry. The Sbaiti firm. I don't know how to pronounce the name of that firm. But that's the same firm who filed the DAF action. And it was filed on behalf of an entity called PCMG, and then there's a bunch of Roman numerals after it. PCMG had a very, very, very small interest in the Highland Select Fund, which is an entity managed by Highland that's 99.95 percent owned by Highland, and then the balance, I think, is owned by this fund and maybe

a little bit by Mr. Okada. This firm is owned by Mr. Dondero.

They filed an action on the 21st. We found out about it by accident yesterday, because we haven't been served yet. We haven't fully digested it, but the crux of the matter is that Mr. Seery breached his obligations under the Investment Advisers Act when he sold the Trussway asset and the SSP asset for under value and for not allowing Mr. Dondero to bid on those assets.

And so we will respond accordingly, Your Honor, and that's -- I really can't get into it because we just got it last night and we're still digesting it.

THE COURT: But the Debtor is the one and only Defendant?

MR. DEMO: I believe that's the case, Your Honor, yes. So, there -- there were no allegations that they're going to add Mr. Seery like the last one, but yes.

MR. SEERY: I'd be happy to offer some clarity if you'd like, Your Honor.

THE COURT: Yes. Go ahead, Mr. Seery.

MR. SEERY: We received a copy of this lawsuit through the -- originally through the press and then we hunted it down. We have not been served. It's by an entity called PCMG, and I believe it's 17, Roman Numeral XVII. It is a small entity owned by Mr. Dondero and Mr. Okada. It owned .2 percent of Highland Select Equity Fund. Highland Select

Equity Fund owned 89 -- or does own 89.9 percent of Trussway Holdings. It's this -- PCMG is no longer a partner in Highland Select Equity.

Trussway Holdings owned 76.6 percent of SSP Holdings, which was an entity that was sold. The remaining balance of that, those interests were owned by third parties, including a small business lending group.

The complaint was just filed against the Debtor, arguing nonsensically that somehow the Debtor has an obligation to PCMG as an investor in Equity Select. Anyone who knows anything about the Investment Advisers Act knows that's not the case, that the obligation is to the fund, not to the investors.

We'll deal with it, but it's just another of the myriad of examples filed by the Sbaiti firm -- this is their second go -- of just creating costs. This one is a -- if you go derivatively, it's a .137 percent interest in SSP.

THE COURT: All right. Well, we --

MR. SEERY: Thank you.

THE COURT: Thank you, Mr. Seery. We have a hearing on the other lawsuit that includes you as a defendant coming up in June. I can't remember when in June.

MR. DEMO: It's June 8th, Your Honor.

THE COURT: June 8th. In person. So I'm going to stay tuned for what this Sbaiti law firm has to say.

To say I'm concerned is a big understatement, but we'll hear what the evidence and argument is on June 8th. I hope the message gets delivered how concerned I am to hear that yet another lawsuit has been filed that appears to be an end run around certain prior orders of the Court.

So, all right. We'll look for the order on the stay.

MR. DEMO: Yes, Your Honor.

THE COURT: And again, we'll try to be as quick as we can on the reports and recommendation.

(Proceedings concluded at 3:36 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **05/27/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	June 24, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3004-sgj**
Plaintiff,	
	DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER [32]
v.	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,	
Defendant.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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For Highland Capital Management Fund Advisors, LP, Defendant:	Davor Rukavina MUNSCH, HARDT, KOPF & HARR 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - JUNE 24, 2021 - 9:58 A.M.

THE COURT: All right. Matter Number 6 this morning is Highland versus Highland Capital Management Fund Advisors, LP, Adversary 21-3004. We have Defendant's Motion for Leave to Amend Answer. So I'll ask first, it looks like we have Mr. Rukavina out there appearing for the Defendant. Is that correct?

MR. RUKAVINA: Yes, Your Honor. Good morning.

THE COURT: Good morning. Do we have the Debtor-Plaintiff appearing this morning?

MS. WINOGRAD: Hi, Your Honor. This is Hayley Winograd appearing on behalf of the Debtor. For some reason, the Cisco Webex isn't letting me turn my camera on. But I'm trying to. So just bear with me for a minute.

THE COURT: Okay. All right. Well, we can at least hear you loud and clear.

We probably have interested observers, but I'm guessing no other appearances, since it's just these two parties?

(No response.)

THE COURT: All right. Well, Mr. Rukavina, am I correct that there is no opposition to this motion?

MR. RUKAVINA: Your Honor, there's been no objection filed, even though this motion was filed more than a month ago, and Mr. Morris and I were talking a couple days ago about submitting basically a consent order. Unfortunately, I got

buried with court in front of Judge King yesterday. So I would ask that the Court summarily grant this motion based on the lack of objection, timely objection, and based on the simple standard under Rule 15.

That being said, I am prepared to argue the motion if the Court believes that that's necessary.

THE COURT: Well, --

MS. WINOGRAD: So, Your Honor, --

THE COURT: -- Ms. Winograd?

MS. WINOGRAD: -- this is -- oh, I'm sorry.

THE COURT: Go ahead.

MS. WINOGRAD: This is Hayley Winograd. Unfortunately, I can't get my camera started, so I apologize. But the Debtor is unopposed to Highland Capital Management Fund Advisors' motion to amend their answer. The parties are working on a global revised scheduling order for all of the notes litigations, in light of amended pleadings on both sides.

THE COURT: All right. Well, thank you for that report.

All right. In light of there being no objection, and this appearing to have merit under Rule 15(a), I do grant this motion as presented. And so, Mr. Rukavina, if you'll upload your order.

As I recall, this is one of three adversary proceedings

where I have a report and recommendation being drafted, not yet finished, with regard to the motion to withdraw the reference.

So, again, you can go ahead and upload your order, and then hopefully we're going to have that report and recommendation finalized and in the District Court's hands pretty soon. All right? Like you, we've been very snowed under here, and we just --

MR. RUKAVINA: Yeah.

THE COURT: -- have had it in the queue of things to finish off.

All right. Well, thank you. That concludes this morning's Highland matter. Okay.

MR. RUKAVINA: Thank you, Your Honor. May we be excused?

THE COURT: Yes, you may.

(Proceedings concluded at 10:01 a.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **07/01/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 2, 2021

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § §	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. Defendant.	§ § § § § § § § § § §	Adv. No. 21-03004

ORDER GRANTING DEFENDANT'S MOTION TO AMEND

CAME ON FOR HEARING on the 24th day of June, 2021, the *Defendant's Motion for Leave to Amend Answer* (the "Motion"), filed by Highland Capital Management Fund Advisors, L.P. (the "Defendant"). Having considered the Motion and, for the reasons stated on the record of said hearing, finding that the Motion should be granted, it is hereby:

ORDERED that the Motion is GRANTED and that the Defendant shall have ten (10) days from the date of entry of this Order to file its *Defendant's Amended Answer* attached to the Motion as Exhibit "B."

END OF ORDER # #

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MANAGEMENT FUND ADVISORS, L.P.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § §	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. Defendant.	§ § § § § § § § § § § §	Adv. No. 21-03004

DEFENDANT'S AMENDED ANSWER

COMES NOW Highland Capital Management Fund Advisors, L.P. (the "Defendant"), the defendant in the above-styled and numbered adversary proceeding (the "Adversary Proceeding") filed by Highland Capital Management, L.P. (the "Plaintiff"), and files this its *Defendant's Amended Answer* (the "Answer"), responding to the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* (the "Complaint"). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMFA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant denies ¶ 14 of the Complaint.

15. The Defendant denies ¶ 15 of the Complaint.

16. The Defendant denies ¶ 16 of the Complaint. The document speaks for itself and the quote set forth in ¶ 16 is not verbatim.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. HCMFA's Default under Each Note

19. The Defendant admits that Exhibit 3 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 19 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 19 of the Complaint is denied.

20. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 20 of the Complaint.

21. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 21 of the Complaint and therefore denies the same.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 22 of the Complaint and therefore denies the same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 23 of the Complaint and therefore denies the same.

24. The Defendant denies ¶ 24 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. Paragraph 25 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

26. Paragraph 26 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 26 of the Complaint.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 27 of the Complaint.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 28 of the Complaint.

29. The Defendant denies ¶ 29 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. Paragraph 30 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

31. Paragraph 31 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 31 of the Complaint.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 32 of the Complaint.

33. The Defendant denies ¶ 33 of the Complaint.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter. To the extent ¶ 34 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 34 of the Complaint and therefore denies the same.

35. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 36 of the Complaint.

37. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

38. At all material times to the Complaint, the Defendant, a registered advisor, advised various third-party funds as to their investments. One such fund was Highland Global Allocation Fund ("HGAF").

39. At all material times to the Complaint, the Defendant contracted with the Plaintiff whereby the Plaintiff, through its employees, would provide certain services to the Defendant,

including with respect to the Defendant's advice to the third-party funds. These services so provided included accounting, legal, regulatory, valuation, and compliance services.

40. In March, 2018, HGAF sold equity interests it held in TerreStar. As part of this, it was necessary to calculate the "net asset value" ("NAV") of these securities and of HGAF assets. The Defendant was responsible for advising on the NAV. In turn, pursuant to the Shared Services Agreement in effect at that time between the Plaintiff and the Defendant, the Plaintiff was responsible to the Defendant to calculate the NAV, and the Plaintiff had several employees charged with these and similar calculations as part of the Plaintiff's routine business services and as part of what the Plaintiff regularly provided to the Defendant and affiliated companies.

41. The Plaintff made a mistake in calculating the NAV (the "NAV Error"). The NAV Error was discovered in early 2019 as HGAF was being converted from an open-ended fund to a closed-ended fund. The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. Ultimately, and working with the SEC, the Plantiff determined that the losses from the NAV Error to HGAF and its shareholders amounted to $7.5 million: (i) $6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) $1.4 million of losses to the shareholders of HGAF.

42. The Defendant accepted responsibility for the NAV Error and paid out $5,186,496 on February 15, 2019 and $2,398,842 on May 21, 2019. In turn, the Plaintiff accepted responsibility to the Defendant for having caused the NAV Error, and the Plaintiff ultimately, whether through insurance or its own funds, compensated the Defendant for the above payments by paying, or causing to be paid, approximately $7.5 million to the Defendant directly or indirectly to HGAF and its investors.

43. At this time, Frank Waterhouse ("Waterhouse") was the Chief Financial Officer to both the Plaintiff and the Defendant. Waterhouse signed the two promissory notes the subject of the Complaint (the "Notes"). He did not sign the Notes in any representative capacity for the Defendant. The Defendant did not authorize Waterhouse to sign the Notes or to bind the Defendant in any way to the Note.

44. Waterhouse made a mistake in preparing and signing the Notes for the Defendant. Upon information and belief, Waterhouse was not aware that payments from the Plaintiff to the Defendant were to compensate the Defendant for the NAV Error and resulting damages, instead assuming that the Notes were like prior notes between the Plaintiff and the Defendant. Waterhouse failed to properly inquire into the underlying transaction and, either for unknown accounting or other purposes, Waterhouse prepared and signed the Notes on his own, without proper knowledge of the underlying facts and without actual authority from either the Plaintiff or the Defendant.

45. In sum, neither the Plaintiff nor the Defendant intended that any funds paid by the Plaintiff to the Defendant be treated as debt but that they instead be treated as compensation by the Plaintiff to the Defendant for the NAV Error that the Plaintiff caused. The Notes are an unauthorized mistake and a nullity, and are void for a lack of consideration.

46. To the extent Waterhouse had apparent authority to bind the Defendant to the Notes, such apparently authority does not apply to the Notes because Waterhouse's lack of actual authority is imputed to the Plaintiff, as Waterhouse was the CFO for the Plaintiff.

47. Accordingly, the Notes are void or unenforceable for lack of consideration, for mutual mistake, and for the lack of authority from the Defendant to Waterhouse to execute the same for the Defendant.

JURY DEMAND

48. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

49. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 6th day of July, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 6th day of July, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the plaintiff.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:21-CV-00881-X
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,	§	
	§	
Defendant.	§	

ORDER

Before the Court is a report and recommendation from the United States Bankruptcy Court. [Doc. No. 2 Exhibit 1]. The Bankruptcy Court recommends that this Court grant the defendant's motion to withdraw the reference when the bankruptcy court certifies that this action is ready for trial and defer all pretrial matters to the Bankruptcy Court. The defendant filed a limited objection.[1]

This Court holds that the Bankruptcy Court's familiarity with the facts and the parties make it well-situated to handle pretrial matters in this case. This Court further finds that allowing Bankruptcy Court to handle pretrial filings would further both judicial economy and the important goal of uniformity and efficiency in bankruptcy administration.

[1] Doc. No. 5.

Therefore, this Court **ACCEPTS** the recommendation. This case is hereby **REFERRED** for pretrial management to the United States Bankruptcy Court. When the Bankruptcy Court's concludes this case is ready for trial, that Court should notify this Court, and this Court will then withdraw the reference.

IT IS SO ORDERED this 14th day of September, 2021.

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § §	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. Defendant.	§ § § § § § § § § § §	Adv. No. 21-03004

DEFENDANT'S SECOND MOTION FOR LEAVE TO AMEND ANSWER AND BRIEF IN SUPPORT THEREOF

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DEFENDANT'S SECOND MOTION FOR LEAVE TO AMEND ANSWER AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW Highland Capital Management Fund Advisors, L.P. ("HCMFA" or the "Defendant"), the defendant in the above styled and numbered adversary proceeding (the "Adversary Proceeding") commenced by Highland Capital Management, L.P. (the "Debtor"), and files this its *Defendant's Second Motion for Leave to Amend Answer and Brief In Support Thereof* (the "Motion"), respectfully stating as follows:

I. SUMMARY[1]

1. By this Motion, HCMFA requests leave to amend its answer to expressly deny that the Notes were signed. HCMFA does not concede that this relief is required, as it has already denied that it signed the notes—Mr. Waterhouse purportedly signed them as maker. However, the Uniform Commercial Code ("U.C.C.") appears to require a more express denial of signature.[2]

2. This is not an ordinary note case. The way that the Notes were signed, the fact that they did not go through "legal," the absence of evidence that anyone involved was told that the underlying transfers were loans—accounting personnel *assumed* the transfers to be loans— and the fact that the Debtor was liable to HCMFA for causing a valuation error that led to $7.4 million in liabilities, which was the purpose of the transfers; *i.e.* compensation, all demonstrates that the Notes are a mistake created by Debtor employees in good faith based on their assumptions, and not the facts. Indeed, it is now apparent that Mr. Waterhouse did not sign the Notes or authorize his electronic signature.

[1] This Motion is supported by the *Defendant's Appendix in Support of Second Motion for Leave to Amend Answer*, filed concurrently herewith, and cited to herein as HCMFA APP.

[2] *See* TEX. BUS. & COMM. CODE ANN. 3.308(a).

3. This case is an example of how one mistake and assumption snowballs and leads to another, which leads to another, and which leads to yet another, with a plaintiff now seeking to exploit these mistakes—its own mistakes, by the way—rather than looking at the actual facts:

Step 1. Mr. Dondero went to Mr. Waterhouse and told Mr. Waterhouse to transfer $7.4 million to HCMFA. Mr. Dondero never told Mr. Waterhouse that this was a loan; just to transfer the funds. In fact, the transfers were compensation from the Debtor to HCMFA because the Debtor, through its negligence, created a $7.4 million liability of HCMFA to third parties. Mr. Dondero never told Mr. Waterhouse that the transfers were loans.

Step 2. Mr. Waterhouse did not have the authority to enter into a loan of this size either for HCMFA or the Debtor. He simply told his controller to transfer the funds and put the matter out of his head.

Step 3. That controller, pursuant to a multi-year course of conduct and many other inter-company promissory notes, asked a subordinate to paper the transfers as loans, assuming that they must be loans because intercompany transfers are usually booked as such and the auditors need paper notes.

Step 4. The subordinate, who is not a lawyer, took a Word document form, years old, and populated it, instead of going through the legal department. And, instead of asking Mr. Waterhouse to sign the notes, she affixed a .jpg image of his signature to the Notes, without authority from him.

Step 5. Now that there are notes in the system, and even though none of them know anything about it, accountants and auditors do what they do: they record and report the Notes, thereby breathing life into something that should never have been.

Step 6. Complicating matters, there were prior promissory notes from HCMFA to the Debtor in the amounts of $6.3 million—similar to $7.4 million—such that persons subsequently reviewing books and records would naturally have assumed that HCMFA's books, which carried the Notes, were referring to these old notes and not something new, such that the mistake was not caught until after this litigation commenced.

II. TIMING

4. NexPoint will first address timing issues, since the Debtor is certain, as it always does, to allege that NexPoint somehow delayed in asserting a right, conveniently ignoring that it had NexPoint's documents, that it had secured an injunction preventing Mr. Dondero from talking

to Debtor employees, and that it had instructed its key employees not to communicate with HCMFA regarding this litigation. HCMFA APP 3-6. The following dates are key:

(i) April, 2021. Mr. Sauter interviews Mr. Waterhouse, who basically informs him that, as he did not use electronic signatures in May, 2019, if a note has his signature, then he must have signed it. *Id*. 7 (¶ 23). HCMFA at that time has no reason to question this. *See id*.

(ii) May 28, 2021. HCMFA serves a request for production on the Debtor, which includes "[a]ll Microsoft Word copies of the Notes, including Metada." *Id*. 819.

(iii) The Debtor does not produce the same. *Id*. 815 (¶ 5). As late as October 19, 2021, as HCMFA is deposing Mr. Waterhouse—the person who purportedly signed the Notes—the Debtor is still refusing to produce the original Word documents of the Notes.[3]

(iv) October 19, 2021. The Debtor and HCMFA depose Mr. Waterhouse, who testifies that he does not remember signing the Notes and, if he authorized someone to affix his electronic signature to the Notes (even though he was not sure this was being done in May, 2019), then there would be an e-mail from him to an administrative assistant so authorizing. *See* Discussion, *infra*, at pp. 12-16.

(v) October 25, 2021. The Debtor finally produces the original of the Notes. HCMFA APP 815 (¶ 5). This confirms that the signature of Mr. Waterhouse is not even an electronic signature, but rather a .jpg image of his signature affixed to the Word version (not even the .pdf version) of the Notes. *See* Discussion, *infra*, at pp. 20-21.

(vi) October 27, 2021. HCMFA deposes Mr. Klos and Ms. Hendrix and learns that Ms. Hendrix affixed Mr. Waterhouse's signature to the Notes, apparently assuming that this was authorized, but without actual authority to do so. No document authorizing Ms. Hendrix to so do has been produced. *See* Discussion, *infra*, at pp. 19-23. *See* HCMFA APP 815 (¶ 6).

5. Through no fault of HCMFA, it was not until the completion of these depositions that HCMFA learned that Mr. Waterhouse did not sign the Notes and that he did not authorize his

---

[3] "John, I also asked you for the Word versions of these notes so we could look at the properties, and you have not provided them. Are you intending to?

MR. MORRIS: No."

HCMFA APP 198 (146:12-17).

electronic signature to the Notes. In that respect, discovery worked as it should, and HCMFA should now have the ability to amend its Answer accordingly.

III. BACKGROUND FACTS

A. THE NOTES, THE ADVERSARY PROCEEDING, AND HCMFA'S DEFENSE

6. On January 22, 2021, the Plaintiff filed its *Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* (the "Complaint"), thereby initiating this Adversary Proceeding. By the Complaint, the Debtor seeks to recover on two demand promissory notes allegedly issued by HCMFA (the "Notes") and signed by Frank Waterhouse ("Waterhouse"): (i) a note dated May 2, 2019 in the amount of $2.4 million; and (ii) a note dated May 3, 2019 in the amount of $5 million.

7. Each of the Notes, in its body, defines "maker" as HCMFA. On the signature pares, however, the Notes say:

MAKER:

FRANK WATERHOUSE

8. Mr. Waterhouse does not sign the Notes in any representative capacity, such as "Treasurer" or "Chief Financial Officer." (Dkt. No. 1 at exh. 1 & 2).

9. On May 22, 2021, HCMFA filed its *Defendant's Motion for Leave to Amend Answer* (Dkt. No. 32), and on July 2, 2021, the Court entered its *Order Granting Defendant's Motion to Amend* (Dkt. No. 45). Accordingly, on July 6, 2021, HCMFA filed its *Defendant's Amended Answer* (Dkt. No. 48), asserting various affirmative defenses, including that Waterhouse did not have authority to execute the Notes on behalf of HCMFA and that, therefore, HCMFA did not sign the Notes. (Dkt. No. 48 at pp. 5-7).

10. The purpose of this prior amendment was to assert that the Notes were executed by mistake, which is also relevant to the present Motion. Pursuant to a Shared Services Agreement, HCMFA contracted with the Debtor, for pay, for the Debtor to provide various valuation services to HCMFA as it advises various funds. HCMFA APP 13-25. The Debtor made a mistake relating to a valuation issue for one of those funds, Highland Global Allocation Fund, and specifically the valuation of TerreStar. *Id*. 325-330 (273:10-278:13). This mistake led to liability at HCMFA of $7.4 million. *See id*. It is HCMFA's position that this was the Debtor's liability under the Shared Services Agreement, as the Debtor breached the standard of care and its duties as specified in the agreement. *See, e.g., id*. 18 (§ 6.01). Soon thereafter, as HCMFA needed money (both to pay the remaining portion of that liability and to pay a $5 million consent fee to the investors of a fund), Highland transferred these sums ($7.4 million) to HCMFA. *Id*. 334-35 (282:24-283:5). This was done at the direction of Mr. Dondero, who believed that it was proper for Highland to transfer these funds to compensate HCMFA for Highland's valuation error, and not as a loan from the Debtor to HCMFA.[4] HCMFA APP 334-35 (282:12-283:7).

11. As detailed below, that is when the errors and assumptions began: The Debtor's (and HCMFA's) Chief Financial Officer, Frank Waterhouse ("Waterhouse"), perhaps assumed that, when Mr. Dondero told him to transfer the funds, it was a loan, even though Mr. Dondero never told him that it was a loan; the Debtor's controller, David Klos ("Klos"), when told to transfer the funds by Mr. Waterhouse, assumed that this was a loan and assumed that promissory notes should be prepared; and Kristin Hendrix ("Hendrix"), Mr. Klos' subordinate, prepared the Notes as instructed by Mr. Klos, and purported to electronically sign Mr. Waterhouse's name to

[4] This is further evidenced because the source of the funds that the Debtor used to pay HCMFA came from funds paid into the Debtor by Mr. Dondero. Clearly Mr. Dondero knew what was going on, and clearly he intended the subsequent transfer to be compensation. Otherwise he could have just transferred funds to HCMFA directly.

the Notes. All of these individuals, in the accounting group and not the legal group, simply assumed that funds flowing from the Debtor to HCMFA must be loans, and therefore that the loans must be "papered up" for accounting and audit purposes, as had been done many, many times in the prior fifteen years.

12. The Debtor will point out instances where HCMFA carried the Notes as liabilities on its books and records. There is evidence of that, but there is also evidence otherwise. That is not conclusive, however, or even necessarily persuasive to the jury—of course the same accounting personnel who *assumed* that the transfers were loans would then carry the resulting (mistaken) Notes on the books and records.

B. WATERHOUSE'S DEPOSITION AND ADMISSION OF MISTAKE

13. As noted, Mr. Waterhouse signed the Notes as "maker." Certainly, his signature does not indicate any representative capacity such as "treasurer" or as "CFO." In the body of the Notes, "Maker" is defined as HCMFA. Thus, there is ambiguity and, more importantly, *prima facie* liability for Mr. Waterhouse.

14. Here, the Texas U.C.C. contemplates this potential and directly applies, providing as follows:

> (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.
>
> (2) Subject to Subsection (c), the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity, or (ii) the represented person is not identified in the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

TEX. BUS. & COMM. CODE ANN. § 3.402(b). The comments to the U.C.C. explain with an analogous situation:

> Case # 3. The name "Richard Roe" is written on the note and immediately below that name Doe signs "John Doe" without indicating that Doe signed as agent.
>
> In each case Doe is liable on the instrument to a holder in due course without notice that Doe was not intended to be liable. In none of the cases does Doe's signature unambiguously show that Doe was signing as agent for an identified principal. A holder in due course should be able to resolve any ambiguity against Doe.
>
> But the situation is different if a holder in due course is not involved. In each case Roe is liable on the note. Subsection (a). If the original parties to the note did not intend that Doe also be liable, imposing liability on Doe is a windfall to the person enforcing the note. Under subsection (b)(2) Doe is prima facie liable because his signature appears on the note and the form of the signature does not unambiguously refute personal liability. But Doe can escape liability by proving that the original parties did not intend that he be liable on the note. This is a change from former Section 3-403(2)(a).

U.C.C. cmt. 3.

15. Mr. Waterhouse was asked at length about his potential personal liability on the Notes:

> Q. Okay. But back then when you signed this, did it ever cross your mind that you were the maker on these notes?
>
> A. No.
>
> Q. Back then when you signed this document, did it ever cross your mind that you could be a co-obligor on these notes?
>
> A. No. I didn't receive $7.4 million, I mean...
>
> * * *
>
> Q. So putting all other issues aside, if the law -- if the law says that you were liable for those notes because of how you signed them, then would you agree with me that these notes are a mistake?
>
> MR. MORRIS: Objection to the form of the question.
>
> MS. DANDENEAU: Objection to the form.

A. Yes.

HCMFA APP 357-59 (305:16-307:4).

16. Given that the law makes Mr. Waterhouse *prima facie* liable for the Notes, even though that was not his intention, the Notes are a mistake and Mr. Waterhouse admitted that they are a mistake. More to the point however, Mr. Waterhouse testified extensively regarding whether he signed (or did not sign) the Notes. This is important because, when HCMFA first interviewed Mr. Waterhouse regarding the Notes (once he was no longer prohibited by the Debtor from communicating with HCMFA regarding litigation matters), Mr. Waterhouse stated that, if the Notes bear his signatures, then he must have signed them as he did not use an electronic signature in May, 2019. HCMFA APP 7 (¶ 23). In other words, even though HCMFA had reason to believe that the Notes were a mistake, it had no reason at that time to believe that Mr. Waterhouse did not actually sign the Notes.

17. This changed when HCMFA deposed Mr. Waterhouse on October 19, 2021. The deposition began with Mr. Waterhouse repeatedly testifying that he did not recall signing the Notes, even though the signatures were his. "I don't recall specifically signing this, but this is my signature." HCMFA APP 193 (141:4-7). In other words, as he had told HCMFA in April, 2021, given that the signature is his, he must have signed the Notes. As detailed below, however, once Mr. Waterhouse reviewed the Notes and confirmed that they contain his electronic signatures, it became clear that he did not sign the Notes and, equally as importantly, that he did not authorize his electronic signature to the Notes.

18. First, Mr. Waterhouse confirmed some background facts. He confirmed that he, as the CFO for the Debtor and an officer of HCMFA, would not have had the authority on his own to cause the Debtor to lend, or HCMFA to borrow, $7.4 million [subject to objection]. Only Mr.

Dondero would have had that authority [subject to objection]. HCMFA APP 322-25 (270:18-273:9). Mr. Waterhouse admitted that, as a result of the TerreStar valuation error, shareholders in funds advised by HCMFA had damages of between $7 and $8 million. *Id*. 329-30 (277:7-278:13). Mr. Waterhouse confirmed that Mr. Dondero told him to transfer funds from the Debtor to HCMFA:

> I testified earlier, that I had a conversation with Mr. Dondero for -- for these amounts attributable to – it was either the error -- you know, the error, and in that conversation he said, go get the money from Highland.

Id. 334-35 (282:24-283:5).

19. Critically, Mr. Waterhouse could not remember if Mr. Dondero told him this was a loan. *Id*. 336 (284:4-6). Mr. Waterhouse did not remember if Mr. Dondero told him to have promissory notes prepared. *Id*. 336 (284:18-20). Regarding the genesis of the Notes, Mr. Waterhouse testified:

> Q. Okay. And would you have signed two promissory notes obligating HCMFA to pay Highland $7.4 million without Mr. Dondero's prior knowledge and approval?
>
> MS. DEITSCH-PEREZ: Object to the form.
>
> A. You know, from -- from what I recall around these notes, you know, I don't recall specifically Mr. -- Mr. Dondero saying to – to make this a loan. So my conversation with Mr. Dondero around the culmination of the NAV error as related to TerreStar which was a -- a – I think it was a year and a half process. I don't know, it was a multi-month process, very laborious, very difficult. When we got to the end, I had a conversation with Mr. Dondero on where to, you know, basically get the funds to reimburse the fund, and I recall him saying, get the money from Highland.
>
> Q. And so he told you to get the money from Highland; is that right?
>
> A. That is what I recall -- in my conversation with him, that is -- that is what I can recall.

HCMFA APP 196-97 (144:14-145:22). Asked if he would disagree with Mr. Dondero that Mr. Dondero never told him to make the transfers loans, Mr. Waterhouse testified [subject to objection]: "all I recall is he said, get the money from Highland." *Id*. 370 (318:3-10). Continuing:

> And you don't remember discussing with Mr. Dondero what the terms of those two promissory notes should be?
>
> A. I don't recall -- I testified all I recall is he said, get the money from Highland. I don't -- the -- the terms of the note, I don't recall ever having a discussion around the terms of the note, but since I don't draft the notes, that -- there could have been a conversation with other people later.

Id. 371 (319:7-16).

20. When asked whether it was possible that, "when Mr. Dondero told you to transfer the funds from Highland, you just assumed on your own that those would be loans without him actually telling you that those would be loans," Mr. Waterhouse testified [subject to objection] that "I don't know." HCMFA APP 339 (287:4-13). Asked again whether, seeing $7.4 million being transferred out of the Debtor, whether it is possible that he assumed this to be a loan, Mr. Waterhouse answered [subject to objection]:

> I don't know. As I testified earlier, I had conversations with Mr. Dondero about -- about the -- the -- the moneys that were needed for the NAV error. And I recall him saying go get it from Highland -- or get it from Highland.

Id. 340-41 (288:19-289:8). In fact, Mr. Waterhouse confirmed that it was on his "initiative" to have the Notes drafted [subject to objection]. *Id*. 342 (290:4-16). And, Mr. Waterhouse believed that the legal team would be involved with drafting the notes. *Id*. 342 (290:15-16).

21. Mr. Waterhouse did not recall if the Notes were presented to him on paper form to sign. *Id*. 344-45 (292:14-293:17). Mr. Waterhouse testified:

> I signed very few documents via email. I can't say that it never happened, but people either stopped by my office and physically walked in documents for signature that we discussed face-to-face.

Id. 345-46 (293:25-294:5). And, before signing documents, Mr. Waterhouse would usually have the legal department or the compliance department sign off on the document. *Id*. 346-348 (294:16-296:7). When asked again if he remembered signing the Notes, Mr. Waterhouse testified [subject to objection]:

> They would -- they would have been presented physically on paper most likely or someone would have left it. But, I mean, again, I don't -- I don't recall."

Id. 348 (296:8-18). And, Mr. Waterhouse confirmed that, back then, he used an "ink pen" to sign documents, as he told HCMFA in April, 2019. *Id*. 348 (296:19-25).

22. When presented with the Notes and asked whether he believed that he ink-signed them, Mr. Waterhouse answered:

> These -- these -- these signatures are identical, now that I stare at them, and I mean, they are so close -- I mean, they're identical that, I mean, even with my chicken scratch signature, I don't know if I can – you know, I do this 100 times, could I do that as -- as precisely as I see between the two notes.

Id. 350 (298:2-17). Pressed further regarding whether he "actually signed either or both notes":

> Is -- I don't -- I don't recall specifically. As I said before, my assistant did have a -- an electronic signature, and that was used from time to time. It wasn't as common practice back in 2019. It definitely was more common practice when we had to work from home and remotely for COVID because it that made it almost impossible to, right, provide wet signatures since we're all working from home remotely.
>
> Q. Well, going just for these two promissory notes, Mr. Waterhouse, in light of your inability to remember any details, are you sure you actually signed either or both of those notes?
>
> MS. DANDENEAU: Objection to form.
>
> A. I don't recall specifically signing -- actually physically signing these notes. As I said before, I don't recall doing that. This -- this looks like my signature, but yet these two signatures are identical.
>
> Q. So you don't recall physically signing them, and I take it you don't recall electronically signing them either?

> A. I don't recall. You know, Highland has all my emails. If that occurred, you know, you know, I don't have any of these records is what I'm saying. I don' t have any of those records.

Id. 350-52 (298:300:4).

23. Regarding the possibility that Mr. Waterhouse electronically signed the Notes, as rare as that may have been in May, 2019, Mr. Waterhouse testified as follows:

> And help me here. I'm not very technologically astute. When you -- and I – I recognize that you do it rarely, but when you sign a document electronically, do you believe that there is an electronic record of you having authorized or signed a document electronically?
>
> MR. MORRIS: Objection to the form of the question.
>
> I -- I don't know the tech answer to that, but, you know, since I don't have – I don't ever attach my signature block electronically, my assistant would have done that, and if that is done over email like we did several times -- you know, multiple, multiple times over COVID, she would attach my signature block and then email it out to whatever party.
>
> Q. What was your assistant's name in May 2019?
>
> A. It was Naomi Chisum.
>
> Q. Is she the only one? I'm sorry, was she your only assistant that would have maybe facilitated logistically something like you just described?
>
> A. You know, she was out on maternity leave at some point. I don't -- I don't recall those dates where she was out for maternity leave. There was -- there were folks backing her up. I don't recall specifically who those -- who those, you know, administrative assistants were, and I don't recall specifically if she was out during this time on maternity leave.

Id. 372-73 (320:11-321:20).

24. Aside from providing valuable testimony regarding the genesis of the Notes, for purposes of the present Motion Mr. Waterhouse testified: (i) that he does not remember signing the Notes in person or electronically; (ii) he rarely signed documents in May, 2019 electronically; (iii) he would have expected that documents he signed were approved by the legal department; (iv) the Notes strongly appear to be signed electronically; and (v) if signed electronically, he would

have sent an e-mail authorizing the same. Interestingly, he also testified that it would have been his "assistant" to sign his name electronically; not Ms. Hendrix, a mid-level manager and not an "administrative" assistant.

25. No such e-mail authorizing Mr. Waterhouse's electronic signature has been produced by the Debtor. HCMFA APP 815 (¶ 6).

C. MR. KLOS' DEPOSITION AND CREATION OF THE NOTES

26. HCMFA deposed Mr. Klos on October 27, 2021. In May, 2021, Mr. Klos was the controller for the Debtor. HCMFA APP 661 (8:11-13). It is Mr. Klos who directed Ms. Hendrix to prepare the Notes. *Id*. 721 (68:4-13). Mr. Klos discussed how funds would be transferred from one affiliated entity to another as needed for liquidity:

> And you joined Highland in 2009. From that point in time, 2009, through 2019, was there any practice at the enterprise of those businesses to transfer funds between each other on a basis of when one needed it and one had it?
>
> A. Yes, that was a fairly, generally speaking, that was a fairly common practice, of using different entities within the overall structure to bridge liquidity.

Id. 682-83 (29:24-30:7). Klos also testified as to the standard practice that, where the Debtor was transferring funds out, the transfer would be booked as a loan:

> So over the general -- talking about generally now, over those 10 years when there were these intercompany transfers for liquidity purposes, how were they booked by the debtor, by Highland Capital Management?
>
> MR. MORRIS: Objection to the form of the question.
>
> THE WITNESS: Help me on the direction. So this is money that Highland is receiving or money that Highland is sending?
>
> Q. (BY MR. RUKAVINA) Sending out.
>
> A. Sending out. So this is -- in the scenario that you're describing, this money that Highland is sending out to meet some other corporate obligor's liquidity needs?
>
> Q. Yes, sir.

> A. So those would be booked as a loan. I would -- I need to hedge a little bit because I'm not a hundred percent certain, but I would say if not exclusively via loans close to exclusively.
>
> Q. And would they -- strike that. Would they usually be papered up with a promissory note?
>
> A. Yes.
>
> Q. Now, why was that the general course during 10 years? Was there a policy and procedure in place, or would Dondero say book it as a loan, or was that just the right thing to do from an accounting perspective?
>
> MR. MORRIS: Objection to the form of the question.
>
> THE WITNESS: At the end of the day it's at the direction of Jim Dondero, so I can't tell you exactly why he wanted it to be done that way. But that was certainly the practice of how it was done in those situations.

Id. 685-87 (32:20-34:5).

27. Thus Mr. Klos believed that the underlying transfers were loans, in part because he believed that Mr. Waterhouse would have told him that (but could not recall for certain), and in part because of past practice. *Id*. 722-23 (69:1-70:14). Mr. Klos described the usual course at the Debtor with respect to papering intercompany loans:

> Q. (BY MR. RUKAVINA) So going back to this Exhibit 3, sir, why did you ask Kristin, can you or Hayley please prep a note for execution? Why them? Remember, I was asking about what the course or procedure was at that point in time.
>
> A. Yeah, so nomenclature, procedure, process. I would say the informal process for these types of loans, they were frequent in nature, would be for someone on the corporate accounting team to prepare a note and have it executed.
>
> Q. Okay. That was the standard course back then?
>
> A. Again, I don't know what standard course means. That was fairly typical.
>
> Q. Why would you not have asked someone in the Highland legal department to prepare a note?
>
> A. Because this was a legally reviewed document as far as the form of the agreement. It's a one-page, two-paragraph form that had been used for a long time.

> So the only thing that would change with respect to these notes would be the date, the amount, likely the rate. I can't think of anything else offhand that would have changed from note to note.
>
> Q. After you asked Ms. Hendrix to prepare this note, did you have any further role with respect to the papering, preparation, or execution of that note?
>
> A. Not that I can remember.
>
> Q. Would you have had any role in having either or both of the notes actually signed electronically or by ink by Mr. Waterhouse?
>
> A. Likely not, no.

Id. 736-37 (83:19-84-24).

28. The point is simple: when professional accountants at the Debtor saw funds flowing from the Debtor to an affiliate, such as HCMFA, they *assumed* that the funds were a loan and papered it as such, as this is how it had been done for many years on many occasions.

D. MS. HENDRIX'S DEPOSITION AND LACK OF AUTHORITY TO SIGN THE NOTES

29. HCMFA deposed Ms. Hendrix on October 27, 2021. In May, 2019, Ms. Hendrix was the senior accounting manager at the Debtor. HCMFA APP 461 (12:4-16). At that time, she reported to Mr. Klos, who reported to Mr. Waterhouse. *Id*. 461-62 (12:25-13:9). While Ms. Hendrix never drafted a promissory note from scratch, in May, 2019, part of her job was taking a form note and revising it. *Id*. 466 (17:5-11). At that time, it was the corporate accounting group at the Debtor, not the legal group, that was responsible for updating draft promissory notes so as to create new ones. *Id*. 466 (17:20-25). As Ms. Hendrix testified:

> Our typical practice is if we have a loan with certain affiliates that it's a demand note. We have a template that we have used for years that was created by either our internal legal team or an outside law firm, I'm not sure which. The typical practice is always updating a few things on that template, getting it executed, and filing it in our audit folders.

Id. 467 (18:18-25). The corporate accounting group, not the legal group, did this "updating." *Id*. 468-69 (19:1-13; 20:1-5). And Ms. Hendrix confirmed the general purpose of the intercompany notes:

> Typically anytime specifically Jim Dondero would need to move money between related parties, he would pay down -- when I say him, he would have us in corporate accounting move money around, pay off notes, reissue new notes somewhere else. So a way to move money around between his entities.

Id. 470 (21:10-16). Stated differently, at that time "it's all one big happy family, and whoever needed cash, the cash moved around." *Id*. 472 (23:3-6).

30. In May, 2019, Mr. Klos sent one or two e-mails to Ms. Hendrix—emails on which Mr. Waterhouse but not Mr. Dondero or the legal department were copied—informing her that there were new intercompany loans and asking her to prepare notes for execution. *Id*. 481-82 (32:13-33:4). This instruction comported with the general practice:

> So is it fair to say that typically, obviously not every time, but typically your corporate accounting group when it would see intercompany transfers in large amounts would believe that they were loans?
>
> MR. MORRIS: Objection to the form of the question.
>
> THE WITNESS: Typically they were loans. There's not really another way to get money from one entity to another. And if they were papered as a loan, that means we were told to set it up that way.

Id. 484 (35:5-15). That is "how it was for 14 or 15 years." *Id*. 485 (36:7-9).

31. Ms. Hendrix confirmed that the $2.4 million Note was "related to a TerreStar NAV error" and the $5 million Note was for the "consent fee." *Id*. 487-88 (38:17-39:5). Ms. Hendrix was never "told to [her] directly" that the funds were a loan, but she [subject to objection] "assum[ed] that based on many instances of intercompany transfers in the 14 years prior." *Id*. 489 (40:20-25).

32. Ms. Hendrix confirmed that she prepared the Notes from Word documents originally created by outside counsel. *Id*. 491 (42:15-43:20). However, Ms. Hendrix had no memory of papering the Notes. *Id*. 494 (45:21-46:1). It would have been her practice to not consult the legal group in preparing the Notes. *Id*. 495 (46:12-24). Ms. Hendrix confirmed that, to sign Mr. Waterhouse's name to the Notes, she used an electronic picture of his signature, which she then affixed to the Word documents, the same as the undersigned counsel does below:

33. On the question of whether Mr. Waterhouse authorized Ms. Hendrix to affix his signature to the Notes, Ms. Hendrix testified "I don't have exact specific memory." *Id*. 497 (48:10-15). Again, she appears to have assumed that Mr. Waterhouse must have approved the Notes and, therefore, her using his signature:

> He was fine with using his e-signature, and what is on these documents was that exact e-signature.
>
> * * *
>
> But he would have had to approve this loan in the dollar amount, the day. He would have been the one directing us to create these loans. In past practice he has always approved using his e-signature to execute documents.

Id. 497(48:4-18). When pressed about *how* Mr. Waterhouse would have authorized his electronic signature to be used, Ms. Hendrix testified as follows [subject to objection]:

> I would assume that, as I've stated previously, these directions were coming directly from him to paper a loan. These changes that are made are only to the dollar amount. Interest rate is pulled right off the IRS website. That is his approval to paper a loan and in fact execute or approve the loan.

Id. 497-98 (48:24-49:5).

34. Then, when asked [subject to objection] "after his e-signature was used either on these notes or other documents in May of 2019, would you have brought the documents back to him for any kind of verification," Ms. Hendrix testified:

> Probably not. These are all very standard. We've papered hundreds of loans. So I think he trusted that we can handle updating a date and a dollar amount on these loan templates.

Id. 499 (50:1-9).

35. Ms. Hendrix also testified [subject to objection], differently from Mr. Waterhouse, that "[p]robably at this time, 99 percent of the stuff my team got his signature on was his e-signature." *Id*. 498 (49:12-16). And, the following exchange is significant:

> Q. (BY MR. RUKAVINA) Do you know or believe, or your recent review of documents, did it reveal an email from Mr. Waterhouse to you specifically authorizing his e-signature on Exhibits 4 and/or 5?
>
> A. Not that I recall seeing, no.
>
> Q. Sitting here today, do you have any memory of Mr. Waterhouse orally or otherwise specifically authorizing you to affix his e-signature to Exhibits 4 and/or 5?
>
> A. Specifically on these loans, no, I don't recall those conversations. But, again, our practice has always been we have this discussion, he's under the understanding that we're going to paper the loans, he's always comfortable with using his e-signature. This is not something me or my team would have done without that authority and approval from him.

Id. 499 (50:15-25).

36. And, there is no evidence that Ms. Hendrix ever showed the Notes to Waterhouse after preparing them:

> Q. Sitting here today, do you have any memory of giving Mr. Waterhouse these two promissory notes after they were prepared?
>
> A. I specifically don't remember walking into his office and providing it to him, but he could have found it on our shared drive if he wanted to.

> Q. Do you have any memory or in your recent review of documents did you see any email to the effect of you sending either or both of these promissory notes to Mr. Waterhouse after they were papered up?
>
> A. I don't have any specific recollection, again, but he had access to look at them.
>
> Q. On the shared drive?
>
> A. Yes.

Id. 503 (54:4-17). Scanning in the Notes and then saving them to the system, is hardly a substitute for showing or giving them to the man who is personally liable on them to the tune of $7.4 million.

37. Ms. Hendrix *assumed* that the transfers were loans and *assumed* that Mr. Waterhouse authorized her to affix his signature to the Notes because she *assumed* that he approved of the Notes. But her testimony directly conflicts with his: whereas he testified that he rarely used electronic signatures in May, 2019, and would have had to send an e-mail authorizing the same, and would have expected that the legal department would approve a note prior to his signature, she testified that he routinely did this at that time pursuant to some generalized authority and that the accounting department routinely papered notes.

38. The fact remains that, notwithstanding her good faith, Ms. Hendrix created erroneous notes (as they appear to make Mr. Waterhouse the "maker" and to make him jointly and severally liable), and she was not authorized—at least there is no evidence that she was authorized—to affix images of Mr. Waterhouse's signature to the Notes or, if there was some generalized authority that she believed Mr. Waterhouse gave her, then the condition precedent—that the legal department approve the Notes—was not satisfied.

IV. ARGUMENTS AND AUTHORITIES

39. This Motion is necessarily driven by the facts; hence the lengthy discussion of recent discovery proceedings above. From those facts, the following sequence emerges:

(i) Mr. Dondero told Mr. Waterhouse to transfer the fuds, and Mr. Waterhouse does not recall Mr. Dondero telling him that this was a loan, perhaps assuming this to be the case.

(ii) Mr. Waterhouse told Mr. Klos to process the transfers, and perhaps he also told him that the funds are a loan. Either way, pursuant to standard practice, Mr. Klos believed that the funds were a loan and instructed others to paper up the Notes, without any instruction from Mr. Dondero that the transfers were a loan.

(iii) Ms. Hendrix then, again pursuant to standard practice, took an old form for a note and populated it with new details and created the Notes.

(iv) Mr. Waterhouse did not sign the Notes. Instead, Ms. Hendrix affixed pictures of his signature on the Notes. She did not then provide the Notes to him.

(v) There is no evidence that Mr. Waterhouse authorized Ms. Hendrix to do so. Neither Mr. Waterhouse nor Ms. Hendrix remembers any such express authorization. Moreover, Mr. Waterhouse confirmed that, if he authorized an electronic signature, he would have e-mailed such authority to his administrative assistant. Ms. Hendrix was not his administrative assistant. And, Mr. Waterhouse confirmed that he would only sign a note if the legal department approved the note, which did not occur here.

40. HCMFA therefore submits that Ms. Hendrix, in good faith and acting pursuant to an established course and pattern, was not authorized to affix Mr. Waterhouse's signature to the Notes. Instead, she *assumed* that, as Mr. Waterhouse had authorized the Notes, she was authorized to sign them for him. And, despite Mr. Waterhouse's expectations, none of this went through the legal department. Hence the result, where Mr. Waterhouse signed as "maker" and is *prima facie* jointly liable, something that he confirmed was a mistake. But it is the same note—if that is a mistake, then so is the whole note.

41. Importantly, the Scheduling Order does not provide for a deadline to seek leave to amend the operative pleadings. *See* Docket No. 67. This means that, unlike the heightened "good cause" standard under Rule 16, the more lenient standard of Rule 15 applies to this Motion. That rule provides that "[t]he court should freely give [leave] when justice so requires." FED. R. CIV. P. 15(a)(2). The Court must "possess a 'substantial reason' to deny a request for leave to amend." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). The Fifth Circuit has outlined five

"considerations" guiding the Rule 15 inquiry: "1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." *Id*.

42. There has been no undue delay. As discussed above and evidenced with the Appendix, HCMFA did not know that Mr. Waterhouse did not sign the Notes until his deposition, as he had previously told HCMFA that he assumed he must have signed the Notes since the Notes bear his signature. It is the Debtor who delayed in producing the original Notes, requested in May, 2021, until late October, 2021, going so far as to even say that it would not produce the originals on October 19, 2021 (a decision which, to its credit, it subsequently reversed). Had the Debtor produced the originals in May or June, as requested, it would have been obvious that the signatures were electronic signatures, and perhaps HCMFA would have reasonably questioned any authority to sign, but this did not happen due to the Debtor' delay. And, it was not until HCMFA deposed Mr. Waterhouse, Ms. Hendrix, and Mr. Klos that the facts were learned. There is nothing that HCMFA could have done to expedite this process. On the contrary, discovery worked as it should have.

43. There is no bad faith or dilatory motive. All of HCMFA's defenses are made in good faith and are supported by the evidence. That evidence may be subject to dispute and to contradictory evidence, but then that is the point of a trial. Certainly, there is enough testimony and evidence to support the defense that Mr. Waterhouse did not sign the Notes or authorize their signing. Nor is HCMFA trying to "weasel" its way out of a debt: the Debtor, through its negligence, caused a $7.4 million liability to HCMFA. It was just and proper for the Debtor to compensate HCMFA, which it did. None of this is "invented" after the fact or presented in bad faith.

44. There are no repeated failures to cure deficiencies. True, this is the second motion to amend the answer. But, the first motion was necessitated by the simple fact that HCMFA did not have access to its books and records (then still under the control of the Debtor), and the Debtor had prohibited its employees, including Mr. Waterhouse, from discussing litigation matters with HCMFA. In many ways, that first motion should not have to count against HCMFA. Either way, for the same reasons as discussed above with respect to timing, HCMFA did not know and could not have known about this defense until the end of October, 2021, meaning that there was no prior "deficiency" to now cure.

45. There is no undue prejudice to the Debtor. Trial is not set. All of the people with knowledge of the Notes have been deposed, and if the Debtor needs additional discovery, then it can readily take it. The Debtor certainly believes that it already has strong arguments as to why HCMFA's defenses have no merit, as it will no doubt present in opposition to this Motion. And, as the Debtor has had possession of the originals of the Notes all of this time, and as Ms. Hendrix and Mr. Klox are still the Debtor's employees, as was Mr. Waterhouse through February, 2021, none of what is stated in this Motion should come as a surprise to the Debtor, as much as the Debtor may disagree with HCMFA's position and arguments.

46. Finally, the amendment is not futile. Texas law provides for a recognized defense when a promissory note is not signed. *See* TEX. BUS. & COMM. CODE ANN. § 3.401(a).

47. Mr. Waterhouse, Mr. Klos, and Ms. Hendrix have each given testimony that raises serious doubt regarding whether Mr. Waterhouse actually signed the Notes or authorized his electronic signature—something that the Court cannot adjudicate at this stage. The Debtor will have every opportunity to argue at trial why the defense is wrong, and it will have every opportunity to present its evidence.

48. Accordingly, as no substantial reason exists to deny the amendment, and the interests of justice support freely granting leave, the Court should grant leave to the Defendant to amend its Answer.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, HCMFA respectfully requests that the Court enter an order: (i) granting this Motion; (ii) granting HCMFA leave to file the Amended Answer attached hereto as Exhibit "A"; and (iii) granting HCMFA such other and further relief to which it may be justly entitled.

RESPECTFULLY SUBMITTED this 30th day of November, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with John Morris, Esq., counsel of record for the Debtor, who informed the undersigned that the Debtor opposes said relief.

/s/ Davor Rukavina
Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 30th day of November, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on the Plaintiff through its counsel of record.

/s/ Davor Rukavina
Davor Rukavina